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NORTH CAROLINA REPORTS,

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"CAROLINA LAW REPOSITORY,"

CONTAINING

"OPINIONS OF AMERICAN JURISTS, AND REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF NORTH CAROLINA."

VOLS. I AND II.

—ALSO—

"NORTH CAROLINA TERM REPORTS,"

OR

"CASES ADJUDGED IN THE SUPREME COURT OF NORTH CAROLINA, FROM JULY TERM, 1816, TO JANUARY TERM, 1818, INCLUSIVE.

BY J. L. TAYLOR,

(Chief Justice of the Supreme Court.")

[Vol. 4]

SECOND EDITION.

WITH NOTES REFERRING TO SUBSEQUENT ENACTMENTS OF THE LEGISLATURE, AND DECISIONS OF THE COURT OF CONFERENCE AND THE SUPREME COURT, MARGINAL ABSTRACTS, A TABLE OF THE CASES REPORTED, AND A NEW INDEX,

BY WILLIAM H. BATTLE, ESQ.

One of the Judges of the Superior Courts of Law and Courts of Equity of the State of North Carolina.

RALEIGH:
PUBLISHED BY TURNER AND HUGHES.
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RALEIGH.....THOMAS J. LEMAY.....PRINTER.

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LAW REPOSITORY.

VOLUME I.

CIRCUIT COURT OF THE UNITED STATES,

NORTH CAROLINA DISTRICT, *Nov. Term*, 1813.

PECK *vs.* R. & T. WILLIAMSON—Page 53.

A judgment obtained in one State is not *conclusive* between the parties when sued upon in another.

MARSHALL, Chief Justice.

POTTER, District Judge.

Debt on a judgment received by the plaintiff against the defendants, in the Supreme Court of Massachusetts. Among other points involved in the case, was the much agitated question as to the effect which a judgment obtained in one State, should have when suit is instituted upon it in another State.

It was contended on behalf of the plaintiff, that the judgment was as conclusive to every purpose, as if it had been rendered in the court, where suit was brought; and this by the express provision of Congress under the Constitution.

On behalf of the defendant, it was urged that the judgment was merely *prima facie* evidence of a debt, liable to be rebutted by other testimony, agreeably to the well known rule of the common law, in respect to foreign judgments.

After an elaborate argument on this point, by R. Williams for the plaintiff, and D. Cameron and Gaston for the defendants,

Marshall, Chief Justice, delivered the

Opinion of the Court.

As this very important question has not yet been decided in this court, nor in the Supreme Court of the United States, my brother Judge and myself feel ourselves at liberty to pronounce that opinion which our own judgment dictates. To us it appears very clear, that the Constitution makes a pointed distinction between the *faith* and *credit*, and the *effect*, of a record in one State, when exhibited in evidence in another. With respect to the former, the Constitution is peremptory that it must have full *faith* and *credit*; with respect to the latter, it provides that Congress *may prescribe the effect thereof.* Unless Congress had prescribed its effect, it should be allowed only such as it possesses on common law principles. In our opinion, Congress have not prescribed its effect. To suppose that they have, is to believe that they use the words "faith and credit," in a sense different from that which they have in the clause of the Constitution, upon which they were legislating.

It is very doubtful, however, whether this opinion would receive the sanction of the Supreme Court. A different one has been delivered by Judge Cushing, in the Federal Court of Virginia. Judge Washington has also recently decided in favor of the conclusiveness of such a judgment; and from the case cited at the bar, from the New York Term Reports, such appears to be the opinion of Judge Livingston.*

Note.—See *Wade* v *Wade*, Conf. Rep. 486. *Carter* v *Wilson*, 1 Dev. & Bat. Rep. 362. *Knight* v *Wall*, 2 Dev. & Bat. Rep. 125. *Mills v Duryee*, 7 Cranch's Rep. 481. *Hampton* v *Mc Connell*, 3 Wheaton's Rep. 234. *Mayhew* v *Shatcher*, 6 Wheaton's Rep. 129, which seem to establish the contrary, to wit, that a judgment obtained in one State and sued upon in another, has, by virtue of the 1st section of the 4th Article of the Constitution of the United States, and the Act of Congress of 1790, the same effect as it would have had, had it been obtained in the State where the suit upon it is brought.

* The defendant being permitted to impeach the consideration of the judg-

ADJUDGED CASES IN THE

SUPREME COURT OF NORTH CAROLINA.

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NOTE.—See S. C. reported in 1 Murph Rep. 343.

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PERRY'S ADMR'S *vs.* RHODES AND OTHERS.—Page 82.

NOTE.—See S. C. reported in 2 Murph. Rep. 140.

BATEMAN *vs.* BATEMAN—Page 85.

NOTE.—See S. C. reported in 2 Murph. Rep. 97.

HOUTON *vs.* HOLLIDAY—Page 87.

NOTE.—See S. C. reported in 2 Murph. Rep. 111.

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ment, introduced very strong testimony for that purpose, upon which the jury with the approbation of the court, found a verdict for the plaintiff for a sum far short of that which he had recovered in his original judgment.

BROWN *vs.* BRADY—Page 89.

NOTE.—See S. C. reported in 2 Murph. Rep. 117.

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NOTE.—See S. C. reported in 2 Murph. Rep. 234.

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NOTE.—See S. C. reported in 2 Murph. Rep. 237.

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NOTE—See S. C. reported in 2 Murph. Rep. 238.

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NOTE.—See S. C. reported in 2 Murph Rep 251.

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NOTE.—See. S. C. reported in 2 Murph. Rep. 228.

ARRINGTON *vs.* BATTLE—Page 109.

NOTE.—See S. C, reported in 2 Murph. Rep, 240.

M'FARLAND *vs.* M'DOWELL—Page 110.

When, in an answer to an injunction bill, the facts, on which the complainant grounds his equity, are positively denied, or when the truth of them is greatly impaired by reason of the facts and circumstances stated in the answer, and the defendant swears that he has no knowledge of the truth of complainant's allegations, and that he disbelieves them; from the facts and circumstances so set forth and sworn to, complainant's equity is rendered doubtful, the court will dissolve the injunction.

The bill prayed an injunction and general relief. Upon the coming in of the answer, the injunction was dissolved, and the case was sent up to this Court, to decide whether the bill was sufficiently answered, so as to warrant a dissolution of the injunction. The Bill, answer and documents referred to were voluminous; but it is presumed that the opinion delivered brings forward enough of the case to render the decision intelligible.

LOWRIE J. delivered the opinion of the Court:

It is admitted that the complainant has set forth and charged such facts in his bill as entitled him to the interference and aid of a Court of Equity against defendant's judgment at law; that those facts and allegations had been admitted, or not denied, by the answer of the defendant. It is also true, that the defendant, in his answer, has not directly and positively denied the truth of the plaintiff's allegations. On this ground, it is contended, that the complainant, notwithstanding the defendant's answer, is still entitled to such aid and protection.

Although the defendant has not positively denied the truth of the facts set forth in the complainant's bill, yet he has set forth in his answer, such facts and circumstances, and has so supported them by written documets, referred to in his answer, and desired to be considered as a part thereof, and accompanying the same, as go very far in disproving the allegations of the complainant. And he positively answers, that he disbelieves the truth of said allega-

tions, grounding his belief upon the said documents, and the other circumstances set forth in his answer, and referred to the Court.

A Court of Equity, on motion to dissolve an injunction, will always look to the answer of the defendant; and whenever it can discover that the facts on which the complainant grounds his equity, are positively denied, or that the truth of them is greatly impaired, by reason of the facts and circumstances stated in the answer of the defendant, and when he swears that he has no knowledge of the allegations set forth by the complainant, and that he disbelieves the truth of them: If from the facts and circumstances so set forth and sworn to, the complainant's equity is rendered doubtful, it then becomes the duty of the Court to decree a dissolution of the injunction, and suffer the defendant to proceed at Law.

The facts and circumstances set forth by the defendant in his answer, we believe to be of that character; therefore we are of opinion that the decree of the Superior Court should be affirmed, and we decree accordingly.

Note—See *Moore* vs. *Hylton*, 1 Dev. Eq. Rep. 429. *Lindsay* v *Etheridge*, 1 Dev. & Bat. Eq. Rep. 36.

THIGPEN *vs.* BALFOUR—Page 112.

Note.—See S. C. reported in 2 Murph. Rep. 242.

ADJUDGED CASES IN THE

SUPREME COURT OF NORTH CAROLINA.

July Term, 1811.

HOLLOWELL *vs.* POPE'S DEVISEES—Page 221.

NOTE.—See S. C. reported in 2 Murph. Rep. 108.

WILLIAMS *vs.* BRANSON—Page 224.

NOTE.—See S. C. reported in 1 Murph. Rep. 417.

July Term, 1811.

NICHOLS *vs.* NEWSOM—Page 227.

NOTE.—See S. C. reported in 2 Murph. Rep. 302.

STUART *vs.* FITZGERALD—BAIL—Page 234.

NOTE.—See S. C. reported in 2 Murph. Rep. 255.

DOBSON *vs.* BUSH—Page 236.

A party may interplead to an attachment at any time before final judgment; and to enable him to do so, it is regular to set aside a default which has been entered up two terms.

The plaintiff sued out an original attachment against the defendant, which was returned to December sessions 1811, of the county court, levied on sundry articles; and the suit was then continued without further order, until September sessions, 1812, when judgment by default was entered and the cause continued until March sessions, 1813, when the default was set aside on motion, and Hill was allowed to enter into an interpleader, from which the plaintiff appealed to the superior court, where the order was confirmed and a *procedendo* ordered to the county court. From this order the plaintiff appealed to this court.

Lowrie, J. delivered the opinion of the Court:

The act of 1794, on which the proceedings in this cause are grounded, is remedial, and ought to be so expounded as to obviate the mischief and advance the remedy intended. The object of the Legislature was to speedily settle conflicting claims to property attached.

The decision here complained of, is setting aside the judgment by default, after the cause had been pending two or three terms. It has not however been shewn, nor is it believed, that any evil can arise from such decision. No time is limited by the act of Assembly, when the party claiming the property attached shall interplead. We think he may do so on the return of the writ of attachment, or at any time afterwards, so that it is done before final judgment in the cause.

The party who interpleads makes no answer to the plaintiff in attachment, who may, nothwithstanding such plea, if he has levied on any property belonging to the defendant, prosecute his suit to judgment. We therefore think that at

any time during the pendency of the suit, he may come forward to insist upon having an issue made up to try the right of property. A different construction, such as contended for by the plaintiff in attachment, would facilitate the means of depriving a citizen, for a time, of his property without notice, encourage designing men in their attempts to do so, and reduce the true owner to the necessity of resorting to an action at law for compensatian in damages; all of which mischiefs, we think it was the intention of the Legislature, in passing the law, to provide against.

Let the judgment of the superior court be affirmed.

NOTE.—See further on the subject of an interpleader to an attachment, *Simpson* v *Harry*, 1 Dev. & Bat. Rep. 202.

PARISH *vs.* FITE—Page 238.

NOTE.—See S. C. reported in 2 Murph. Rep. 258.

COTTON *vs.* BEASLEY—Page 239.

NOTE.—See S. C reported in 2 Murph. Rep. 259.

MANN *vs.* PARKER—Page 242.

NOTE.—See S. C. reported in 2 Murph. Rep. 262.

BANK OF NEWBERN *vs.* TAYLOR—Page 246.

NOTE.—See S. C. reported in 2 Murph. Rep. 266.

CARTHY *vs.* WEBB—Page 247.

NOTE.—See S. C. reported in 2 Murph. Rep. 268.

CARR *vs* HAIRSTON—Page 249.

By the act of 1784 (1 Rev· Stat. ch. 104, sec. 1–4) the interposition f a jury is necessary in the laying out, altering or changing roads; but in deciding in the first instance, that there shall be a road in a particular section of the country, or in discontinuing such roads as may be deemed useless, the jury has nothing to do; the whole power being given to the court.

The County Court of Stokes ordered that the road crossing Dan River at Bostick's old place should be discontinued; and after this order was made, Hairston run a fence across the road, and ket it up for the space of one month and more. Carr brought a warrant to recover the penalty given by the thirteenth section of the act of 1784. The road was discontinued without the intervention of a jury: And it is submitted to the Supreme Court, to decide, whether, as the order for discontinuing the road was not founded upon the report of a jury, the same be valid and effectual in law to discontinue the said road. If it be not, judgment to be entered for the plaintiff; otherwise for the defendant.

HENDERSON, J. delivered the opinion of the court.

By the act of 1784, in the laying out, altering, or changing roads, the interposition of a jury is necessary; and the law has directed that damages may be assessed and the most proper grounds pointed out, over which the road shall run. But in deciding in the first instance, that there shall be a road in a particular section of the country, or in discontinuing such roads as may be deemed useless, a jury has nothing to do; the whole power is given to the court. We therefore think the order of the county court, discontinuing the road in question, is a legal one, and such as the court might well have made. It follows therefore that the defendant is entitled to judgment.

HUNTER AND HUNTER *vs.* JACKSON AND JACKSON—

Page 250.

Where A. and B. entered into a covenant with C. and D. to run a horse race on a certain day "for five hundred dollars" to be staked in bonds with approved security. A. alone executed a bond with security, but gave C. and D. no notice of it. Upon the horse of A. B. winning the race, an action was brought on the covenant against C. and D. when *it was held* that they could not recover, because, first, the bond was signed by A. only, and, secondly, the defendants had no notice of it.

This was an action of covenant founded on the following articles:

"*State of North Carolina*, }
Franklin County, }

"Articles of agreement made and concluded this day by and between Henry Hunter and Benjamin B. Hunter, of the one part, and Alsey Jackson and William Jackson, (Miller) witnesseth that the said Henry and Benjamin B. Hunter do agree to run a certain horse called Score double carrying one hundred and fifty-five pounds, against a certain horse

known by the name of Brutus, carrying one hundred and forty-five pounds, which they the said Alsey and William Jackson (Miller) do agree to run ; which race shall be run at Henry Hunter's paths near Tarborough, one quarter of a mile, on the first Thursday in April next, at or before four o'clock in the afternoon, for the sum of five hundred dollars, to be staked in bonds with approved security the said Hunters agreeing to give said Jacksons choice of paths and twenty-five dollars as a compensation for running in the above named paths. Which race shall be entirely void provided either of the principals or either of the said horses should die before the above named day ; otherwise to be run play or pay. In witness whereof we have hereunto set our hands and seals, this first day of December, 1810.

" H. HUNTER, (Seal.)
" BEN. B. HUNTER, (Seal.)
" Witness, " ALSEY JACKSON, (Seal.)
" P. C. PERSONS. " WILAIAM JACKSON, (Seal.)

The plaintiffs declare upon the following breaches :

1st. That the defendants did not stake their bond agreeable to the articles.

2d. That the plaintiffs beat the race.

The plaintiffs proved that on the day named in the articles, the ground was measured, and the weights made out : That precisely at four o'clock, one of the judges, who held the watch, proclaimed that fact, immediately upon which both the parties started : That plaintiff's horse came out twenty feet foremost, bearing his proper weight—Start even : There was no evidence that plaintiffs offered any choice of paths to defendants, or that defendants complained of not having choice : there was no evidence that either of the parties said any thing respecting a stake-holder to deposit bonds with. There was evidence that the plaintiffs gave to one of the judges chosen by himself a paper writing of which the following is a copy :

" For value received, with interest from the date hereof, we promise to pay to Alsey Jackson or Alsey Jackson and

William Jackson (Miller) or order, five hundred dollars. Witness our hands and seals, this 4th April, 1811.

" H. HUNTER, (Seal.)
" LEWIS FORT, (Seal.)

Which was delivered to his said judge, after he was chosen, the day the race was run. There was no evidence that the plaintiffs, or either of them, gave defendants any notice of the above deposit, or that the purpose thereof was explained to the depositee; but depositee conceived himself it was staked on said race. Nor was there any evidence that the plaintiffs called upon the defendants or either of them, to make a like deposit on their part; or that either of them had notice of the deposit by plaintiffs; or that the defendants, or either of them, had ever seen the bond, or had been informed of its contents; or knew that any such was executed. The plaintiffs called a witness, who testified that he had been conversant in the rules of horse-racing, and gave it as his opinion the said deposit was a proper stake, and said his opinion was confirmed on a race with a certain Col. Bynum. The witness being pressed for time (the hour at which they were to start having nearly arrived) made a similar deposit; and that Col. Bynum, who was reputed to be experienced in the rules of racing, being unable to make up his stake, and not running with the witness, paid the money.

There was evidence that a few minutes before the hour of four, plaintiffs called upon defendants to make ready, the time was nearly out. Said witness also declared it was generallly the case to choose a stake-holder.

HALL, J. delivered the opinion of the Court:

It is of no importance to enquire, whether the defendants made out their stakes agreeably to the contract, or not, provided they lost the race. They are as much liable for one breach as two, provided the plaintiffs complied with all the requisites of the contract. But if they have omitted to comply in any one particular, they are as much disabled to recover, as the defendants to defend themselves successfully in case they had done so. Then have the plaintiffs shewn

that they themselves staked agreeably to contract? I think they have not. Because, in the first place, the bond staked by them was only signed by one of them; and in the second place, if it had been signed by both, the defendants had no notice of it, to which they had a right. Suppose the plaintiffs not to have been worth $500, had they not a right to know who the security was? It was expressly stipulated that approved security should be given, which shews that the parties distrusted each others ability to pay. But again, what would have been the situation of the defendants, in case they had won the race, and the plaintiffs had been insolvent, and had said nothing about the bond pretended to be staked? Or suppose by some means, in that situation, they had come to the knowledge, that such a bond was in the hands of one of the judges, could they have recovered it of him as stake holder? He did not know himself, that it was placed in his hands for that purpose, or on what account or for whose benefit it had been delivered to him.

The case is too plain to admit of a doubt. As to what the witness said about the rules pf racing, it is neither entitled to notice or respect. If such be the rules of racing, I should be sorry to consider them to be the rules of this court, being founded neither in reason or justice.

Judgment therefore for defendants.

NOTE.—All bets, contracts &c. in relation to horse racing are declared void by the act of 1810.(1 Rev. Stat. ch. 51.)

NICHOLSON *vs.* HILLIARD—Page 253.

NOTE.—See S. C. reported in 2 Murph. Rep. 270.

MEALOR *vs.* KIMBLE—Page 254.

NOTE.—See S. C. reported in 2 Murph. Rep. 272.

DICKERSON *vs.* DICKERSON—Page 262.

NOTE.—See S. C. reported in 2 Murph. Rep. 279.

SMITH *vs.* WILLIAMS—Page 263.

NOTE.—See S. C. reported in 1 Murph, Rep. 426.

MILLER *vs.* SPENCER'S ADM'RS—Page 264.

NOTE.—See S. C. reported in 2 Murph. Rep. 281.

EVERETT *vs.* ELLISON'S ADMR'S ET AL.—Page 271.

In a proceeding by *sci. fa.* against securities upon an appeal bond, the defendants by not putting the record in issue, admit the statements in the *sci. fa.* to be correct.

Sci. Fa. against the defendants as sureties to an appeal

bond. The administrators of the obligor, the principal in the bond, pleaded *plene administravit*; and no other plea being entered, a verdict was taken against all the defendants. The following reasons were moved in arrest of judgment.

1. That the *sci. fa.* states, there was an appeal to the Newbern Superior Court, whereas the record shews that there was an appeal to the equity side of the court. 2. That the bond is not for prosecuting an appeal according to act of Assembly, but for prosecuting an appeal to the equity side of the court. 3. That the bond is blank, where it should specify the judgment and costs.

Court. The defendants by not putting the record in issue have admitted the statements in the *sci. fa.* to be correct. Whether, independently of the exceptions taken in arrest, and which are confined to the appeal bond, the *sci. fa.* contains sufficient on the face of it, to warrant the judgment of the court against the defendants, we do not decide. The reasons are overruled; but the *sci. fa.* is referred to the Superior Court to pronounce such judgment as the law requires.

ANDREWS *vs.* JOHNSON—Page 272.

Upon an appeal from the County Court in the case of a petition under the act of 1809 for overflowing lands by the erection of a mill, the jury in the Superior Court must meet on the premises.

This cause originated by way of petition to recover damages for overflowing the plaintiff's land by the defendant's mill pond, &c. under the act of Assembly in that case provided. The proceedings upon the petition have been regularly had, and a verdict of the jury returned to the last County Court of Warren, in favor of the defendant; upon which verdict the court pronounced judgment against the plaintiff for the costs of the suit: from which verdict and judgment the plaintiff appealed to the Superior Court of Warren. The question for the decision of the Supreme

Court is, whether this cause is to be tried at bar, or whether a writ is to issue to the sheriff, to summon a jury and try it again upon the premises.

HALL, J. delivered the opinion of the court:

The act of 1809, which gives the mode of redress by petion now pursued, declares that either party shall be entitled to an appeal to the Superior Court; but it is silent as to the mode of proceeding in the Superior Court. It does not direct whether the jury who are to assess the damages shall assess them at bar or on the premises. The act of 1777, commonly called the Court Law, sec. 82, declares that every plaintiff or defendant dissatisfied with any judgment, sentence or decree of the County Court shall be entitled to an appeal; and sec. 84 further declares, that if the trial of the County Court was of an issue to the country, a trial *de novo* shall be had; and if on a hearing of a petition, &c. a rehearing. In other words (as I understand it) that the same mode of trial shall be observed in the Superior Court as was directed in the County Court; and this I should take the rule to be in all cases like the one before us, where an appeal is given to either party, without saying more. If the party appeals from a question of law, the Superior Court will decide it; if from a question of fact, it is the province of a jury to decide it. In the case now under consideration, the appeal seems to have been from the verdict of the jury. That jury gave their verdict on the premises, agreeably to the directions of the act of 1809; they were directed to go upon the premises to be the better enabled to fix upon the proper quantum of damages. If, then, a jury convened under the authority of the County Court, must go on the premises for that purpose, there is the same necessity for a trial on the premises, when it is to be had as to facts in the Superior Court; where the sole question is as to the quantum of damages, a view of the premises is as necessary and as indispensable for the one jury as the other. I therefore think the trial by jury, in both cases, should be on the premises.

NOTE.—The law in this respect is altered by the act of 1813 (see 1 Rev. Stat. ch. 74, sec. 17.)

ALEXANDER, COUNTY TRUSTEE, *vs.* ALEXANDER'S EX'RS.
Page 273.

The act of 1715 (1 Rev. Stat. ch. 65, sec. 11,) will bar an action brought by a county trustee against the executors of a county ranger for money received by their testator in that character, where more than seven years had elapsed from his death to the bringing of the action.

This action was brought to recover money received by the defendant's testator in his life-time as county ranger. The defendant had been dead fifteen years or more. The defendant, among other things, pleaded the ordinary statute of limitations and the statute limiting actions against the estate of deceased persons to seven years. The questions referred to the Supreme Court are, whether the plaintiff's claim is barred by either of the aforesaid statutes of limitation.

By the Court. The act of 1715 is clearly a bar to the plaintiff's recovery; and it is not therefore necessary to consider the question as to the ordinary statute of limitations.

ALBERTSON *vs.* REDDING'S HEIRS—Page 274.

NOTE.—See S. C. Reported in 2 Murph. Rep. 283.

BOYT *vs.* COOPER—Page 277.

NOTE.—See S. C. reported in 2 Murph. Rep. 286.

PAGE *vs.* FARMER—Page 278.

NOTE.—See S. C. reported in 2 Murph. Rep. 288.

STRONG AND OTHERS *vs.* GLASGOW AND OTHERS—Page 279.

NOTE.—See S. C. reported in 2 Murph. Rep. 289.

ATKINSON *vs.* FARMER AND OTHERS—Page 280.

NOTE.—See S. C. reported in 2 Murph. Rep. 291.

SPAIGHT'S EX'RS *vs.* WADE'S HEIRS—Page 284.

NOTE.—See S. C. reported in 2 Murph. Rep. 295.

NELSON *vs.* STEWART—Page 287.

NOTE.—See S. C. reported in 2 Murph. Rep. 298.

CHEATHAM *vs.* BOYKIN—Page 289.

NOTE.—See S. C. reported in 2 Murph. Rep. 301.

ADJUDGED CASES.

SUPREME COURT OF NORTH CAROLINA.

January Term, 1814.

LOWRIE, J. was absent the whole term, from indisposition.

TAYLOR, C. J. was absent part of the term from the same cause.

THORN AND WIFE ET AL. *vs.* WILLIAMS—Page 362.

A Court of Equity will not interfere where the party has a fair and complete remedy at law. Therefore it will not entertain a bill to compel a reprobate of a will, the complainants having been infants and not represented when the will was proved.

SEAWELL, J. delivered the opinion of the court. This is a bill filed in the Court of Equity for the purpose of obtaining a rehearing of the probate of the will of Joseph John Hill, and also praying a discovery of a paper writing not proven, purporting to have been the will of said Hill.

The bill states, that the complainants, the children of Samuel Thorne, are the next of kin of the deceased, and were infants at the time of probate, and not parties. As to Thorne, it charges that he contested the will, and finally, to compose family disputes, withdrew his opposition, but without prejudice to the rights of his children. It further charges that the paper which has been proven as the will, was never intended as such by the deceased, but was written "*in fun, and just to be doing.*" To this bill there is a general demurrer; and it is submitted to this court to determine whether there be any ground stated in the bill to entitle the complainant to the assistance prayed for.

We will first premise, that whenever the principles of the law by which the ordinary courts are guided, tolerate a right, but afford no remedy; or where the law is silent, and interference is necessary to prevent a wrong; or where the

ordinary courts are incompetent to a *complete* remedy, a Court of Equity will afford relief. So also, in cases where it is *essential* to a *fair trial* in the Courts of Law, a Court of Equity will lend *assistant* aid, by compelling discovery of matters necessary for that end; and in this respect she acts as the handmaid of the law. But in no instance is it believed, a Court of Equity will interpose where the party applying has a fair and complete remedy at law. In the present case, the proceedings complained of are those of a Court of Law, and are (if objectionable) either erroneous or irregular. If erroneous, they may be reversed. If irregular, it is competent and within the practice of the Courts of Law to rehear upon petition, if a proper foundation be laid, as in the case of Stewart's will, decided in this court. Without deciding whether the allegations set forth in the bill are sufficient either to reverse or rehear, we are of opinion there is no ground stated in the bill which makes it necessary for the interference of a Court of Equity. And as it does not appear that the paper sought to be discovered is in the possession of defendant, nor if discovered, is essential to answer any purpose, we are of opinion the bill should be dismissed and with costs.

NOTE.—See *Glasgow* v *Flowers*, 1 Hay. Rep. 233, and the cases referred to in the note. See also *Bissell* v *Bozman*, 2 Dev. Eq. Rep. 154. *Armsworthy* v *Cheshire*, Ibid, 234. *Dudley* v *Cole*, 1 Dev. & Bat. Eq. Rep. 429.

WRIGHT'S EX'RS *vs.* WRIGHT'S HEIRS—Page 363.

If it be proved that the party prevailing in the issue has tampered with the jury, a new trial will be granted.

SEAWELL, J. delivered the opinion of the court. This is an appeal from a new trial granted in the court below, and is submitted to this court without any statement. There is an affidavit which accompanies the record, by which it ap-

pears probable the party who prevailed on the issue, tampered with the jury. Whenever an appeal is made without presenting any point for the decision of this court, there would then be no ground for disturbing the decision below. If the affidavit was the ground of the new trial, we should think that the matter set forth was a sufficient cause for it.

ORME *vs.* SMYTH--Page 364.

Where there were but twenty-nine days between the last day of the term of the County Court, and the first day of the Superior Court, it was held that the appellant had until the term following to file the appeal.

SEAWELL, J. delivered the opinion of the court. This is a motion to affirm the judgment of the Court of Pleas and Quarter Sessions of Jones county, in a case where the appellant omitted to file the transcript of the record, with the clerk of the Superior Court, fifteen days before the sitting of the term of the ensuing Superior Court.

The act of 1777, §84, declares, that in case the transcript shall not be filed by the appellant at least 15 days before the sitting of the term of the Superior Court, the judgment shall be affirmed with double costs. The act of 1785 increases the penalty with 12½ per cent. interest. By the 86th section of the act of 1777, it is provided that if it shall so happen that there shall *not* be thirty days between the last day of the term or re-hearing in the County Court, and the next term of the Superior Court to which such appeal shall be made, then such appeal shall be continued, and a transcript &c. shall be filed the term succeeding that which shall immediately follow the County Court term. As these acts, therefore, are highly penal in damages, and deprive the appellant of all defence, it is the duty of the court not to enforce them in any case but such as come expressly within the letter.

Let it then be asked how many days there were between the last day of the term in the County Court and the term of the next Superior Court? It must be answered, only 29. The proviso, then, upon that alternative, gives the appellant till the term next following. It is true the proviso says between the last day of the term or *hearing* in the County Court, and next term of the Superior Court; but it is not for this court to withhold from the appellant, upon *construction*, a privilege which is expressly extended to him by *letter*, in a case so highly penal as the present: Wherefore, let the motion for judgment be over-ruled, and the cause placed upon the trial docket.

NOTE.—The law as to filing the transcript in appeals from the County to the Superior Court is now altered. (See 1 Rev. Stat. ch. 4, sec. 3, 4, 5, 6).

WILLIAMS *vs.* HOLCOMBE—Page 365.

The hirer of a slave is not responsible for his loss, though killed while in the hirer's service, if he used ordinary care and attention, such as a prudent man would afford to his own property.

Where an action is brought for the hire of a slave, and the jury assess damages to less than thirty pounds, the plaintiff must be nonsuited, under the acts of assembly relating to jurisdiction. The act giving concurrent jurisdiction to the Superior and County courts does not repeal that part of the act of 1777 which relates to nonsuits.

The defendant hired of plaintiff a negro boy, about 16 years of age, who was consumed by fire in the defendant's still-house, with its contents, which were valuable, the defendant with some difficulty escaping. In conversation afterwards, the defendant, in accounting for the misfortune, said, he supposed the spirits were losing between the two vessels, and the boy looked under to ascestain it, or to prevent it, when the fire communicated to the spirits.

The Judge informed the Jury, that if the time of hiring was not expired, the defendant was not bound, if he used

ordinary care and attention, such as a prudent man would afford to his own property. On returning their verdict, the Jury said, that they were of opinion, that the time of hiring had not expired, and gave the plaintiff three months hiring, only, at the rate of four dollars per month, making six pounds. On a motion being made for a new trial, by the plaintiff's counsel, the defendant's counsel admitted that the damages in the second count, were too small, and offered to enlarge them to twelve pounds, or any sum the Court might think the evidence warranted. At the trial, and the return of the verdict, the defendant's council moved for a nonsuit, or arrest of judgment, on the second count. The Court overruled the plaintiff's motion for a new trial, from which he appealed.

The defendant then renewed his motion for a nonsuit, or arrest of judgment, whichever might be deemed most proper; which latter part is referred to the Supreme Court—No advantage is to be gained or lost by priority of motion, or the order in which they are stated.

The verdict of the jury is made another part of the case, and which is as follows: "Find for the defendant, on all the issues on the first count in the declaration; and on the second, they find that the defendant did assume for the hire of said negro for three months: that they find for the defendant in the other counts; and they further find that there is no accord and satisfaction and release, and assess the plaintiff's damages in second count to £6. and costs.

The depositions of William Williams and Henry Speer, and a letter from Joseph Williams, the plaintiff, to defendant, and by him produced on trial, also made parts of this case.

It was admitted by plaintiff's counsel, that an additional hiring of three months was made by the plaintiff to the defendant, to commence at the expiration of the former hiring, and at the same rate of hire as the first; but he further stated, that the second hiring had elapsed six or eight days before he was burned to death.

It was stated by Samuel Speers, a witness on the trial, that about twilight of some day about the 3d or 4th of Sep-

tember, 1806 (not exceeding the sixth of the same month and year) when the boy, the defendant and a valuable negro fellow belonging to the defendant, were engaged in defendant's still-house, emptying brandy from the runlet, in which it was received from the still, into a larger vessel, the boy in question holding a candle for that purpose, when the spirits took fire and burned him to death and the negro fellow belonging to the defendant, and all the property of the defendant's in the still house.

SEAWEL, J. delivered the opinion of the Court.

The declaration in this case contains two counts, one to recover the value of the slave, the other to recover the hire.

As to the first, the Jury found that the time of hiring was *not expired*, when the accident befel the slave, and that the accident was not owing to the negligence of the defendant.

As to the other count, the Jury found for the plaintiff, and assessed damages to six pounds. From the evidence on the trial, the plaintiff (if entitled at all on that count) was entitled to about twelve pounds. The defendant's counsel offered to increase the damages to that amount.

At the return of the verdict, the defendant's counsel moved for a nonsuit, under the act of 1777, c. 2, § 10. The plaintiff not having recovered thirty pounds, to which it was alleged the jurisdiction of the Superior Courts was reduced by the act giving concurrent jurisdiction with the County Courts, the plaintiff's counsel moved for a new trial, on the ground of verdict being contrary to law and evidence; and both questions are submitted to this Court.

As to the motion for a new trial, we are all of opinion that the whole circumstances of the case were properly left to the Jury, respecting the expiration of the time; and that the right of the plaintiff, in *law*, to recover, depending upon that fact, which the Jury have found against him; that in a case of doubtful evidence the Court should not disturb the verdict.

As to the motion for a nonsuit, the declaration shews the *nature* of the contract, and the verdict shews the amount, and

both are within the jurisdiction of a Justice. The act of 1777 declares, that where the plaintiff in the Superior Court shall recover less than fifty pounds, he shall be nonsuited; and the act giving concurrent jurisdiction to the Superior and County Courts, not having repealed that part of 1777 which relates to the nonsuit;—we are of opinion, that the plaintiff should have been nonsuited, and therefore that the verdict be set aside and a nonsuit entered.

Note.—On the question of jurisdiction See 1 Rev. Stat. ch. 31, Sec 40, 41, 42, and also *Mera* vs *Scales*, 2 Hawks Rep. 364.

DEBOW *vs.* HODGE—Page 368.

When a testator gives his executors authority to sell land, all the acting executors alive at the time must join in the sale.

In the year 1783, John Debow, being seized of the tract of land described in the plaintiff's declaration, departed this life, having previously published, in writing, his last will and testament, which was admitted to probate after his death, and a copy thereof is sent up as a part of this case. His widow, Lucy Debow, qualified as executrix of the said last will and testament: Jacob Lake, appointed by the testator as one of his executors, never qualified as such, nor did he ever intermeddle with the estate of his testator, until after the intermarriage of the executrix, Lucy Debow, with one Robert Scoby; when the said Jacob Lake made sale of the said tract of land to George Hodge, the father of the defendant, and executed to him the deed of bargain and sale, a copy of which is sent up as a part of this case. Lucy, the executrix of John Debow, deceased, was then alive and did not refuse to execute said deed—the question submitted to the Supreme Court, is, "Whether the deed made by Jacob Lake to George Hodge, is good and valid, in Law, to pass the fee-simple in the tract of land aforesaid, and bar the right

of entry of the lessor of the plaintiff, who is the heir at law of John Debow, dec. If the Supreme Court be of opinion that the said deed is good and valid in law for the purpose aforesaid, judgment is to be entered for the defendant—if not, judgment to be entered for the plaintiff.

HALL, J. delivered the opinion of the Court.

In this case, the testator gives an authority to his executors to sell the land in dispute, and it is of no importance to consider whether that authority is given to them in the character of trustees or of executors; because, although in the first case the authority is annexed to the persons of the trustees, and if one dies before it is executed, it is gone, and the survivor cannot execute it; and in the latter case, the surviving executors may execute such trust. Yet it is indispensable that all the acting executors living at the time should join in such execution. In the present case, the deed was executed only by one of the executors, the other having qualified and being alive at that time. Nor can the defendant derive any aid from the statute of 21st Hen. viii. ch. 4; that statute only provides for the case where one executor refuses to intermeddle with the execution of the will, by enabling the other executors, who take upon themselves the burden of the executorship, to execute such authority by selling the land and making valid all sales by them so made. We therefore think judgment should be given for the plaintiff.

NOTE.—See *Miller* v *White*, Taylor's Rep. 309, and the cases referred to in the note.

BRADLEY *vs.* CARRINGTON—Page 369.

Trespass, and not case, is the proper remedy against a person, who takes out an execution upon a judgment which he knows to be satisfied, and the action may be sustained against an assignor of the judgment who received the satisfiaction, though the execution was taken out in his name by the assignee.

This was an action of trespass, *vi et armis*, brought to recover damages for wrongfully imprisoning the person of plaintiff, and for wrongfully selling his property. The following were the facts:

The defendant, some years past, obtained judgment before a justice of the peace, against one Sherwood Allen and the present plaintiff. That judgment stood unrevived for five or six years, when defendant sold the judgment, as appears by an assignment upon its back, to one Michael Green—Execution was taken out upon the judgment (still unrevived) by Green, in the name of Carrington, and levied upon the whole of plaintiff's property and caused the same to be sold. Execution was then taken out by Green, in the name of Carrington, against the body of plaintiff, and he committed to prison, where he remained till his friends paid the money for him. It appeared also in evidence, that the judgment had been paid off by Sherwood Allen, and a receipt given by Carrington; that Allen had removed to the western country and carried the receipt with him, and had been gone some years before the date of the assignment to Green. The present plaintiff, Bradley, on the trial below, proved the fact of payment by Allen, and obtained and produced the receipt to Allen. The jury found a verdict for the plaintiff for $150; and a new trial was moved for upon the ground that the action should have been Case, and not Trespass; which was ordered by the Judge presiding to be transferred to the Supreme Court, to determine whether there shall be a new trial.

Hall, J. delivered the opinion of the Court.

The plaintiff has sustained a great injury in having had his property sold and his person imprisoned, to pay, not a debt which he or Allen owed, but to satisfy a demand founded neither in honesty or justice. We do not feel ourselves at liberty to attach any share of blame to Green, the assignee of the judgment, because he may have honestly purchased it. But, supposing this to be the case, he then became the innocent instrument of oppression in the hands of Carrington; and Carrington is fully as culpable in having caused Green to take out executions on the judgment which he sold to him, as if he had taken them out himself. And we are clearly of opinion, that where a judgment has been satisfied, and that known to a plaintiff who takes out execution upon it, he is, in a moral point of view, just as culpable as where he takes out execution where there is no judgment, and that fact known to him; in which case, we cannot doubt but an action of trespass would properly lie.

As to the point attempted to be made, namely, what is the remedy when execution is taken out upon a dormant judgment, we think it unnecessary to give any opinion.

Note—See *Allen* v *Greenlee*, 2 Dev. Rep. 370. *Bender* v *Askew*, 3 Dev. Rep. 149. *Coltraine* v *McCain*, Ibid 308.

SETTLE *vs.* WORDLAW—Page 371.

Where a testator bequeathed to his daughter S. a negro girl Nanny, and to his wife a negro woman Fanny, the mother of Nanny; and to his daughter N. the first child Fanny should have; and then directed "that if Fanny should have three children more, they should belong to his daughters S. and N. two a-piece, including Nanny; and all the rest (should she have more than three children, and my said daughters get two a piece) to be equally divided between my sons B. and D." And in another clause bequeathed "that should Fanny have three children so that my two daughters get two a piece, then at my wife's death Fanny and the rest of her children to be the property of B. and D." *It was held* that it was the necessary effect of every legacy to vest immediately, if not controlled or otherwise limited; that as soon, therefore, as three children were born of Fanny, they became vested in the daughters, who had then "two a piece" including Nanny; that Fanny and the rest of her increase then became vested in B. and D.; which the subsequent death of one the issue of Fanny then living, could not alter or affect.

This was an action of detinue for a negro slave, Alfred, in the possession of the defendant. The plaintiff claims under the will of Josiah Settle, dec'd, a copy whereof is hereunto annexed, and agreed to be a part of this case.—The testator died shortly after making said will, and his widow, Nancy, had the same duly proved and took out letters testamentary. The said Nancy then took the negro woman Fanny, in said will mentioned, into her possession, and continued the possession until she, the said Nancy, died, in 1812. She did not marry a second time. She assented to all the legacies in the said will given. The negro girl, Nanny, mentioned in said will, is the child of said Fanny, and the only one born before the testator's death. After the death of the testator, and during the life of his widow, the said Nancy Settle, the said Fanny had the following children, that is to say: James, Franky, Hannah, and Alfred. The said Hannah lived three years, and died in the life-time of the said widow Nancy. The said Alfred is the slave now in dispute, and is the youngest child of the said Fanny; he was born in the life-time of the said Hannah.

The plaintiff is the testator's son, David, mentioned in said will. The testator's son, Benjamin, mentioned in said will, hath legally conveyed his estate held under said will, to the plaintiff.

The jury found a verdict for the plaintiff; and the counsel for the defendant moved for a new trial. Whereupon the court ordered the case to be sent to the Supreme Court. If the Supreme Court should think, upon the construction of said will, that the plaintiff is entitled to recover, then judgment is to be given for him; if he is not entitled to recover, then a new trial is to be granted.

SEAWELL, J. delivered the opinion of the court.

From the will referred to in this case, it appears, the testator devised to his daughter Sarah a negro girl, Nanny, and to his wife a negro woman, Fanny, the mother of Nanny. By another clause, the testator devises to his daughter Nancy the first child Fanny should have; and in case Fanny has no other child, devises her to Nancy. By a further clause the testator devises in these words: "That if Fanny should have three children more, that they belong to my two youngest daughters, Sarah and Nancy, two a-piece, including Nanny already given; and all the rest (should she have more than three children, and my said daughters get two a-piece) to be equally divided between Benjamin and David." In the latter part of the will, the testator makes a further devise, as follows: "That should Fanny have three children, so that my two (evidently meaning two *daughters*) get two a-piece, then, at my wife's death, Fanny and the rest of her children to be the property of David and Benjamin."

The necessary effect of every devise or legacy is to vest immediately, if not controlled, or otherwise limited. As soon, therefore, as three children were born, they became vested in the daughters, and they then had, according to the expressions of the will, "two a-piece," including Nanny.

Fanny, and the rest of her increase, then became vested in Benjamin and David; which the after death of one of the

issue of Fanny, then living, could not alter or affect; and the widow, to whom Fanny's issue is devised, by implication for life, being dead, and it being stated in the case that Benjamin hath legally conveyed to the plaintiff, we are of opinion he is entitled to recover.

NOTE.—See *Conner* v *Satchwell*, 4 Dev. & Bat. Rep. 72.

ALLEN *vs.* MARTIN—Page 373.

Where the name of the subscribing witness to a bond is written by the obligor, the person whose name is signed as witness not being present at the execution of it, it is the same as if there were no subscribing witness, and in such case proof of the obligor's handwriting is sufficient.

The writing on which this action is brought, is in the following words and figures: "Nine months after date, I promise to pay John G. Munrow, the sum of 210 dollars and 62 cents, it being for value received of him; as witness my hand and seal, this the 20th day of May, A. D. 1811." Signed, "John Martin, (*seal*)—Test. John Clark." On said note the following endorsement was made: "I sign over the within note to Hugh Allen, for value received of him, this 27th August, 1811, as witness my hand—John G. Munrow."

On the trial, it was alleged by the plaintiff, that Martin and Munrow, with an intention to defraud the plaintiff, Allen, to whom Munrow was indebted, agreed to make and execute the note as above; that Martin, the obligor, should write the name of John Clark, the witness; and when so executed, that Munrow should endorse as above to Allen, the plaintiff, in satisfaction of the debt he owed him; but of this there was no direct and positive proof—indeed, no legal evidence.

The plaintiff then alleged, that the note was without a witness; offered to prove the hand-writing of the obligor, John Martin; and also offered to prove that the name of

John Clark was in the hand-writing of John Martin, the obligor, and written by him for the purpose of effecting the fraud as above alleged. But, as it seemed agreed on all hands, that a man of the name of John Clark lived in the house of Martin, in May, 1811, the court refused the evidence until the absence of the said John Clark was accounted for. The plaintiff then proved that a man of the name of John Clark, who had lived at the house of Martin, the obligor, in Iredell county, about the time the note was executed, had been seen in the neighborhood of Martin, after this suit was at issue; and the counsel of the plaintiff stated (and his statement was admitted as true) that he acted as agent in fact for Allen, the plaintiff, who lived in the State of Virginia; and that he had enquired after the same John Clark, and could not find out where he was, but had been informed that he had left the country.

It was then proved, that the supposed witness, John Clark, at or near the time of the trial, and for several months before that time (long enough to have procured his deposition, and within the knowledge of the plaintiff) had lived, and did live in the State of South Carolina, not far from Winnsborough in that State.

The witnesses, who proved that a man of the name of John Clark had lived about the house of Martin, the defendant, also proved that he was not often publicly seen in the neighborhood. And two respectable witnesses swore, that they considered the said Clark as a transient person who occasionally came into the neighborhood and went off again; and was, in their opinion, of suspicious character.

Upon this evidence, the plaintiff moved the Court for leave to prove the hand writing of John Martin, the obligor, and that he also wrote the name of John Clark; and though he had never issued a subpœna for John Clark the witness, nor had ever taken a commission for taking his deposition, the court admitted him to do so. The plaintiff then produced and swore Andrew Carson and Samuel Wales, Esquires, who said on oath, that they had seen John Martin, the obligor and defendant, write; that they were ac-

quainted with his hand-writing; and that they believed he wrote the note, signed his name to the same; and that he also signed the name of John Clark, that appeared on the said note.

Upon this evidence, the court admitted the note to be read, and directed a verdict for the plaintiff, subject to the opinion of the court if such evidence was properly admitted; which was found and rendered accordingly. The court doubting as to the admissibility of the evidence, ordered this cause to be sent to the Supreme Court, for its decision.

First, Whether a party is bound to take a commission and procure the deposition of an instrumental witness, who lives beyond the process of the court (the place of his residence being known to him) before he can be admitted to prove his hand-writing? And,

Secondly, As this case is circumstanced, shall he do so; or may he prove the name of the witness written fraudulently by another person, without first procuring the testimony of the supposed witness, if probably known to him, as in this case?

SEAWELL, J. delivered the opinion of the court:

An instrumentary or subscribing witness is required to be produced on the ground that the testimony of a person who has placed his name as attesting witness to a paper, can give more satisfactory evidence of its execution than any other; and not, as it is frequently said, that he is presumed to know the consideration on which it was given. As the rule holds as well where the question is simply as to its execution, as where an illegal consideration is alleged in the pleadings, and as long as that presumption holds, so long the rule prevails; but when it is destroyed, the next best evidence, of which the nature of the case admits, will be received. And that presumption may, in various ways, be destroyed; as, by proving that the witness is dead, or out of the reach of the process of the court, or that diligent search had been made for him, and that he cannot be found; in which cases, proof of his hand-writing may be made; also

by proving that it is a fictitious signature, or that it is in the hand-writing of the obligor himself, or of the obligee, where the bond is assigned, as in the present case; in which latter cases, it is as if there was no subscribing witness; when evidence of the hand-writing of the obligor, as the best the nature of the case affords, would be proper. Thus we think that the Judge did right in suffering the bond to go to the Jury, independently of the circumstances of fraud arising out of the case, that it was a base contrivance between the obligor and obligee, to cheat and defraud some person by endorsing or transferring it. And we cannot forbear to observe, that if the facts stated in this case be true, we scarcely know more fit subjects for a criminal prosecution than the parties concerned. Let the rule, therefore, for a new trial be discharged.

Note.—See *Tulloch* v *Nichols*, 1 Martin's Rep. 27, and the cases referred to in the note—see also the note to *Clements* v *Eason*, 1 Hay. Rep. 18.

JONES AND OTHERS *vs.* ZOLLICOFFER--Page 376.

A bill of review will not lie when the complainant himself dismisses the bill. But if on a demurrer to a bill of review the court reverses the decree, without the objection that the original bill had been dismissed by the complainant being brought to its notice, the question of dismissing the bill of review is not open *on motion*; a petition to rehear being necessary.

It was moved by the defendant's counsel, that this bill be dismissed and stricken from the docket, because the complainants had, in proper person, dismissed the original bill, on which the bill of review had been brought; which dismission appears on the records of this court, in the words following: "This bill is dismissed by the plaintiffs, in person"—said dismission appears on the docket of October term, 1800. A rule was made, on the defendants, to shew cause why the entry of dismission, appearing on the docket

of October, 1800, should not be expunged, because made in vacation, and because not directed by all the complainants. Defendant shews cause, that the proofs are inadmissible to contradict the record. 2d. Insufficient to support the facts.

HENDERSON, J. delivered the opinion of the court.

Two motions were made in this cause, in the court below. The first, by the defendant, to dismiss the bill; the second, by the complainants, to expunge an entry made in the original cause; and three points growing out of these motions, are referred to this court. First, whether it is proper to expunge the entry of dismission, before mentioned? Second, whether parol evidence is admissible, to shew by whom, and at what time, the order of dismismission was given, and at what time entered? And if the complainants should fail in either of those points, whether the motion to dismiss the bill should be sustained? The papers heretofore filed in the office of the clerk of this court, and the decree of the court when the cause was transmitted here before, are made parts of this case, so far as to explain the above points.

From these papers it appears, that this is a bill of review, brought to review a decree, made in a cause between the present complainants, and the defendant Zollicoffer and others, defendants; in which suit, certain issues formed between the complainant and the present defendant, were tried and found for the defendant, to wit; that he was a purser for a valuable consideration, and without notice; and *that he had purchased justifiably.* At the same term at which the issues were found, it was ordered by the court that the complainants should pay to the defendant, Zollicoffer, his costs, and that the sheriff should sell sundry negroes in possession of the other defendants, and bring the money into court as preparatory to a further and final decree.

On the docket of the same term it appears that the bill was dismissed by the order of the complainants—that a demurrer was filed to this bill, and the cause referred to this court—that by the order of this court the decree in the original suit was reversed, and the cause remanded to the

court below, to proceed to judgment—that the order of dismission, before mentioned, did not appear in the copy of the original suit appended to the bill of review.

We think it necessary to examine the defendant's motion only. This motion is made to dismiss the bill, on the ground, that the original bill was dismissed by the act of the parties, and not by the decree of the court; and had this objection been made at the proper time, and founded in fact, there is no doubt but that it must have been sustained; for a bill of review will not lie where the party himself dismisses his bill; for it would be absurd for him to complain of his own act—besides, it would not conclude him, and he might begin *de novo*. But we are now precluded form examining this question, on a mere motion; for the court, in reversing this decree, in the original suit, has passed on this point. It was brought before the court by the demurrer; for if true, it was a reason why the bill should not be sustained. The court has said it should be sustained, and reversed the decree. It is immaterial whether the objection was made or not. It was open to be taken, and the decree negatives all bars to it; and should the defendant think himself aggrieved, by the interlocutory decree of reversal, he may petion the court to rehear it, but he cannot bring it before the court by motion; nor does it vary the case that the entry of dismission did not appear in the copy appended to the bill of review. It was to review and reverse the decree in the cause remaining on record, or on file, that the bill is brought, and to that it refers, and should there be a variance between the copy and original, the latter must prevail. The variance, it is true, will incline a court more easily to listen to petition to rehear, but it will not authorise the court to dismiss on motion. But, was the defendant in time, we think, in fact, there was a decree, and such a decree as, according to the loose practice of the courts of this State, would have concluded the defendant from bringing another bill for the same cause. It is admitted, that were we to tes this question by the strict rules relating to entries, which are observed in England, it would not be called a final decre

But we cannot shut our eyes against our knowledge of the loose manner in which business is transacted in our courts, and of which we, ourselves, are a principal cause. In this case a material fact, as the parties thought, and indeed, it may be said almost the only one relied on by the defendant's answer, was found for the defendant, and this under the order and direction of the court—and whatever may be declared to be the correct practice at this day, at that time the court had a principal hand in directing the issues. The jury, even went further, and found that he justifiably purchased; thus finding both the law and the fact. The court then ordered that the complainants should pay to Zollicoffer his costs; and in the order relative to the other defendants, preparatory to the trial of the cause, said nothing as to the defendant, Zollicoffer. We cannot but view this as a decree in favor of the defendant Zollicoffer, and that the order of dismission, which appears on the docket of the same term applies to the other defendants only; for as to Zollicoffer, it was unnecessary; the cause had been disposed of as to him.

We, therefore, think the motion to dismiss the bill should not be sustained.

FOX *vs.* STEELE AND HAUSER—Page 379.

If the Clerk of the County Court neglect to take a bond from the party previously to issuing a *certiorari* as directed by the act of 1810 (1 Rev. Stat. ch. 4 sec. 16), the Superior Court has power to take bond with good security for the prosecution of the suit.

A *scire facias* will not lie on a bond given upon obtaining a writ of *certiorari*.

John Venables commenced an action in the County Court of Stokes against the plaintiffs. The cause was removed to this court by a *certiorari* obtained by the plaintiff Venables. By an order of court, the plaintiff, Venables, was directed to

give bond and security to prosecute his suit with effect, and did so—the defendants becoming his securities in said bond. The question referred to the Supreme Court is, "Will a *sci. facias* lie on the prosecution bond above described?

SEAWELL, J. delivered the opinion of the court.

This is a *scire facias* against the defendants who became securities for the prosecution of a writ of *certiorari*. The plaintiff failed in his action, and it is contended that the bond is void upon the ground the Court below had no power to require the plaintiff to give bond for the prosecution. That the act of the Gen'l Assembly had not directed the Clerk to take such security, and that the authority of the court was usurped. It is also objected, that if the bond should be consisdered valid, it cannot be enforced by *scire facias*.

We are unanimously of opinion that there is nothing in the first objection—that it is in the power of the court, and that it is its duty to exercise it, in every case, upon application, where bond has been omitted by the clerk, or where the obligors are insufficient.

As to the second objection, we are of opinion, that this bond not being matter of record, a *sci. fa.* will not lie, unless directed by statute; and that however general the practice may have been, and however convenient, yet in point of law it cannot be sustained, and that there be judgment for defendants.

NOTE.—See *Wuller* v *Brodie*, 1 Hay. Rep. 28, and the note thereto. Also *Rosseau* v *Thornberry*, 2 Car. Law. Repos. 442. *Estes* v *Hairston*, 1 Dev. Rep. 354. *Speight* v *Wooten*, 3 Dev. Rep. 327.

Under the act of 1810 (1 Rev. Stat. ch. 4, sec. 16) it is the duty of the Clerk of the County Court, and not that of the Clerk of the Superior Court, to take bond and security upon a writ of *certiorari* being granted. *Edmondson* v *Washington*, 1 Dev. Rep. 252.

LESTER *vs.* ZACHARY—Page 380.

Although a bond is not invalidated by being made without consideration, or with an inadequate one, yet evidence of either fact may be received when the question is, whether the bond was made under such circumstances of *fraud and imposition*, as render it void in law.

Surprise in questions of law, if they be really such as to afford room for doubt, form a ground for a new trial; but not mistake of counsel in a plain point.

This was an action of debt, on bond, for £1000, which is resisted on the ground of fraud and imposition, in obtaining the bond. Evidence of the inadequacy of the value of the bond, among other circumstances, to prove the fraud, was received by the court.

HENDERSON, J. delivered the opinion of the court.

In declaring that evidence of the inadequacy of the consideration of the bond was properly received on trial, it is not intended by the court to countenance, in the most distant manner, an idea that the bond, for that cause, is invalid. The law is too well settled to the contrary, to permit that point to be even doubted; for, if a bond is good without any consideration, inadequacy of consideration, cannot vitiate it. But where the contest is, whether the bond was ever made, or if formally made, whether under such circumstances of fraud and imposition as to render it void in law, inadequacy of consideration may be received as a circumstance to shew the truth of the defence.

With respect to the surprise disclosed in the plaintiff's affidavit, that he had been informed, by his counsel, that evidence of the above description was inadmissible, and that he was, therefore, unprepared to rebut it, it is to be lamented if the fact be so—but it is out of the power of this court, without introducing a rule, pregnant with inconvenience, to remedy it. Surprise, in questions of law, arising at the trial, it is true, affords good ground for a new trial; but then the questions should be such as really afford room to doubt: If every mistake of counsel, however plain the point might

be, afforded causes for new trials, applications of this kind might be without number. We, therefore, think, that there should not be a new trial.

NOTE.—Upon the first point, see *Guy* v *M'Lean*, 1 Dev. Rep. 46; and on the second, see the cases referred to in the note on the last point in *Rutledge* v *Read*, 2 Hay. Rep. 242.

GARDNER *vs.* HARREL ET AL.—Page 381.

If a defendant, on a trial for an assault and battery produce a witness to prove that notice was given to the plaintiff to produce a warrant, on which defendant rested his justification, but the witness being unable to recollect what it was the plaintiff was required to produce, the plaintiff obtained a verdict; a new trial shall not be granted unless the defendant states in his affidavit that he could have made out his justification, if he had been allowed to prove the contents of the warrant.

This was an action of trespass, assault and battery. The defendants plead the plea of justification, and attempted to give evidence of an arrest under a State warrant issued by a magistrate for larceny. The warrant was delivered, by the magistrate, to the plaintiff. The defendants, previous to the trial, were advised by their attorney, to give the plaintiff notice to produce the warrant, or they would give parol evidence of its contents. The defendants introdued a witness to prove the notice, who deposed, that the defendants had carried him to the plaintiff to take notice, and be a witness, concerning something in the case, but what it was the witness could not recollect, as it had entirely escaped his memory. The defendants failing to introduce evidence of notice, in consequence of which, the Court refused to receive any testimony in relation to the warrant, the plaintiff obtained a verdict for £50. A rule for a new trial, on the annexed affidavit, being obtained, it was discharged by the court, and an appeal taken to the Supreme Court.

SEAWELL, J. delivered the opinion of the court.

This is an application to the court, upon the defendant's affidavit to set aside a verdict which the plaintiff has obtained, and to accord a new trial, upon the ground, that injustice has been done the defendants through surprise at the trial.

As the great object of a new trial is the attainment of justice, it rarely happens that courts refuse their interference, where it appears necessary to effect that end. And it may be remarked, that it as seldom happens the party making an affidavit to obtain a new trial, omits any circumstance tending to shew he has merits on his side.

In this case, it is probable, the plaintiff was notified to produce the warrant on the trial, and that the witness, Hyman, had forgotten it when he gave his evidence. But it does not appear the defendants were deprived of any advantage. If they believed they would be able to justify, if permitted to prove the contents of the warrant, it was in their power to have stated it in their affidavit. If they exceeded their authority, the pretext of acting under the warrant would aggravate the case. And without the court's taking that for granted which does not appear, and which, if true, rests in the knowledge of the defendant, there are no grounds for setting aside the verdict.

Wherefore, let the rule for new trial be discharged.

AARON WILLIAM'S EXR'S *vs.* WELLS—Page 383.

In ejectment the first grant will prevail, without regard to the time of entry or survey; and in such case no evidence will be received to show that the grant was obtained by fraud.

Trespass *(quare cl. fregit.)* On the trial of this cause it appeared, that the defendant's entry and survey, were made previous to the entry and survey of the plaintiff—that the plaintiffs' grant of the land in dispute, was obtained previous to the defendant's.

On the trial the defendant offered testimony to prove (as he alleged) that there was fraud, on the part of the plaintiff in procuring his patent. Also, that the plaintiff's testator, Aaron Williams, was a deputy surveyor of said county, at the time of the survey and obtaining his patent.

The court was of opinion, that the defendant would not be permitted to introduce any evidence of fraud, on the part of plaintiffs, and that the patents were the only testimony which would be received by the jury. And as the plaintiff had a patent of a prior date, he was entitled to the lands in question, and also, damages for the trespass. It appeard, also, that the dates of the entries were inserted in the respective patents.

The jury, however, found a verdict in favor of the defendant, upon the grounds, (as they declared) that the defendant, having made the first entry, was entitled to the land.

Upon a motion by the plaintiffs for a new trial, the questions arising out of the aforesaid facts, are reserved for the opinion of the Supreme Court.

Court. The law is too clearly in favor of the plaintiff to admit of a doubt.

Let there be a new trial.

NOTE.—See acc. *Wright* v *Bogan*, 1 Hay. Rep. 177. *Dickey* v *Hoodenpile*, Ibid, 358. *Reynolds* v *Flinn*, Ibid, 106; and see the cases referred to in the note to the last case.

BYRD *vs.* ROUSE—Page 384.

In an action of slander the plaintiff is entitled to two witnesses to prove the first speaking of the words, and two for each repetition of them; and as many to meet the defence set up by the defendant as the court may deem to have been necessary.

This suit was brought to recover damages from the defendant for slanderous words, which was proved to have been

spoken at four different times. In this case thirteen witnesses were introduced on the part of the plaintiff; whereupon the defendant moved the court to order the fees of the supernumerary witnesses to be stricken out of the bill of cost.

HALL, J. delivered the opinion of a majority of the Court.

The act of Assembly made on this subject, declares that neither plaintiff nor defendant shall recover costs for more than two witnesses, where more than two shall be summoned to prove any fact. In the case before us, the plaintiff proved on the trial, as he had a right to do, the original speaking of the words, and the repetition of them at three other different times. Now it is not material, whether there were four different counts, on each of which damages were claimed, or whether there was one count only for the first speaking of the words, the damages on which was attempted to be increased by giving in evidence the repetition of them at other times; because proof of the defendant's having repeated them, is just as necessary in the one case as in the other. It therefore follows, that the plaintiff is entitled to recover the costs of eight witnesses—the two who proved the original speaking of the words, and two for each repetition of them afterwards. With respect to the number necessary for the plaintiff to introduce to meet the defence set up by the defendant, the court cannot judge, not knowing what was proved by the defendant's witnesses. It seems that the Judge who presided allowed him to recover the costs of two witnesses; in doing so, we cannot say he erred. It may have been the case that it was only necessary for the plaintiff to prove one fact in answering the plea of justification; but if in answering that, or any other plea, it would have been necessary to establish several facts, he ought to be permitted to recover the costs of two witnesses for each fact, in case he introduced them to prove it, and more, if in the opinion of the court, they were deemed necessary.

JONES *vs.* CRITTENDEN—Page 385.

The act passed in 1812 "to suspend executions for a limited time," commonly called the suspension act, is unconstitutional, it being prohibited by that part of the 10th section of the 1st Article of the Constitution of the United States, which says that no State shall pass any "law impairing the obligation of contracts."

TAYLOR, C. J. delivered the opinion of the court.

The law of which the defendant claims the benefit, was passed in 1812, and provides that any court, rendering judgment against a debtor for debt or damages between the 31st of December in that year and the 1st of February, 1814, shall stay the same until the first term or session of the court after the latter period, upon the defendant's giving two freeholders as securities. The act also contains sundry details not necessary to be recited.

In deciding the momentous question, whether the will of the Legislature, as expressed in this act, be incompatible with the will of the people, as expressed in their fundamental law, the Constitution of the United States, we disclaim all right or power to give judgment against the validity of a legislative act, unless its collision with the constitution appear to our understandings manifest and irreconcilable. On the contrary, if patient and dispassionate consideration of the subject, produce any thing short of entire conviction, we hold ourselves bound to support a law.

The constitutional will of the legislature, inclination, not less than duty, prompts us to execute; for identified as its members are, with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare; or can result from other than the purest and most patriotic motives.

We have deliberately viewed the question in every light in which the arguments of the learned counsel on both

sides have presented it, and aided by such additional information as our own research or reflection could furnish, the result of our opinion is, that the law in question is unconstitutional, and cannot be executed by the judicial department, without violating the paramount duty of their oaths, to maintain the constitution of the United States.

This conclusion we derive first from the plain and natural import of the words of the Constitution of the United States.

2. From a consideration of the previously existing mischiefs, which it was the design of that valuable instrument to suppress and remedy.

Amongst the important objects, which the people of the United States designed to accomplish by adopting the constitution, that of establishing justice, holds a conspicuous rank. This appears from the solemn declaration of the people themselves in the preamble to that instrument. The enlightened statesman, by whom it was originally framed, had reaped abundant instruction from history and experience. Long accustomed to contemplate the operation of those master principles and comprehensive truths, which form at once, the defences and the ornament of human society; and, which alone can justly form the basis of the social compact; they designed to give them practical effect for the benefit of the American people—to consecrate and make them perpetual. They well knew that while the principle of justice is deply rooted in the nature and interest of man and essential to the prosperity of States, it forms the strongest and brightest link in the chain, by which the Author of the Universe has united together the happiness and the duty of his creatures.

To give a proper direction to these general principles, the clause in the Constitution which presents the question before us, was inserted. Some of its provisions are transcribed from the articles of confederation; others are added because experience had demonstrated that without them the Union of the States would be imperfect. The words are "No State shall enter into any treaty, alliance or confederation; grant

letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, &c."

The obligation of a contract may be impaired by various modes and in different degrees; and the restrictive clause in the constitution does, according to our apprehension of its meaning, annul every act of a State legislature, which shall thereafter produce that effect, plainly and directly in any degree. When, therefore, the validity of the law is maintained by the defendant's counsel, because it does not allow a debtor, who promises to pay in one thing, to pay in another; because it does not absolutely restrain the debtor from paying according to his engagement: or, because it does not allow a third person to interfere between the contracting parties—the answer is, that the examples cited furnish stronger instances of a violation of the constitution than the case before us; they may with stricter propriety be called cases of annulling a contract; but they certainly do not prove that the obligation of contracts is not impaired by the act under consideration.

Whatever law releases one party from any article of a stipulation, voluntarily and legally entered into by him with another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever correspondent to, and coextensive with the duty of the debtor. The first principles of justice teach us that he to whom a promise is made under legal sanctions, should signify his consent, before any part of it can be rightfully cancelled by a legislative act.

The binding force of a contract may likewise be impaired by compelling either party to do more than he has promised. If an act postponing the payment of debts be constitutional, what reasonable objection could be made to an act, which should enforce the payment before the debt becomes due? If, notwithstanding the constitutional barrier, it is competent for the Legislature to hold out to all debtors, that although they fail to pay their debts when they become due,

and their creditors are in consequence compelled to sue them, they shall nevertheless be indulged with a certain time beyond the judgment, supperadded to the ordinary delays of the law; may not the Legislature, with equal authority, announce to all creditors the right of suing for their debts and enforcing payment before the day? Yet the rights of both parties established by the contract, are, in the eye of justice, equally sacred; and whether those of the creditor are sacrificed to the convenience of the debtor, or the subject be reversed, we are compelled to think that the constitution is overlooked.

No unimportant part of the obligation of every contract, arises from the inducement the debtor is under to preserve his faith. With many persons, and it may be hoped, the greater number, a sense of justice and respect for character, form motives of sufficient strength; but how rarely does it happen, that a man lending his money, or selling his property on credit, estimates such motives so highly as to deem them a safe and exclusive ground of reliance? In most cases he would reserve both money and property in his own possession, were he not assured, that the law animates the industry and quickens the punctuality of his debtor; and that by its aid, he can obtain payment in six or nine months. Hence the well considered ceremonies of bonds, mortgages, and deeds of trust, more useful as the instruments of coercive justice, than as preserving the evidence of contract. The act under view destroys this assurance, and while it produces a state of things, the existence of which at the time of contract would have restrained the creditor from parting with his property, it encourages the debtor to relax his efforts to be punctual. It weakens his inducements to fulfil his engagement, and thereby impairs its obligation.

The right to suspend the recovery of a debt for one period implies the right of suspending it for another; and as the state of things which called for the first delay, may continue for a series of years, the consequence may be a total stagnation of the business of society, by destroying confidence and credit amongst the citizens.

An argument urged and much relied on by the defendant's counsel is, that the law in question bears only on the remedy and is therefore within the sphere of legislative authority. But if in so doing it violates the constitution, it is not less invalid, than if it directly touched and annulled the right. Every one will agree, that a law, which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution; that a law which should limit the recovery of all debts to so short a period after its passage, that it would be impossible, according to the course of the courts, to obtain a judgment, would also be null and void; though such laws, ostensibly, bear only on the remedy, yet they do in reality, annihilate the right. The law before us, it is conceded, does not go to the extent of either instance, yet it certainly diminishes the importance and value of the right. It is difficult to conceive how a law could otherwise impair an existing right than by withholding the remedy, which is in effect to suspend the right.

The undoubted right of the legislature to alter and reform the judicial system may, it is said, produce delay in the execution of a contract, equal to that which results from the present law: and it is urged that all such acts must, upon the same principle, be declared unconstitutional.

We cannot acquiesce in the final conclusion drawn from these premises, which, without hesitation, we acknowledge to be correct.

All such laws, the Legislature have an unquestionable right to enact, a right which the people have never surrendered, and the exercise of which is not forbidden by the constitution of the United States.

But it must be considered, that the primary and essential object of all such laws, is the promotion of the administration of justice, its advancement and improvement. If delay grow out of them; if any thing that bears the semblance of a violation of contract follow in their train, it is merely the unintended incident and consequence of the exercise of a lawful authority. It is different with the law before us;

its very design, as expressed in the title, is to do that against which the constitution has opposed its veto.

Many analogous powers, it is argued, have long existed in the State under the authority of the law; that their exercise has been highly convenient to the citizens, and has been universally acquiesced in; that all these must cease to have effect if the suspension law is unconstitutional, to the manifest detriment of the community.

If such effects follow from our decison, there are no citizens in the State who will more sincerely deplore them than ourselves. But we feel too deeply what we owe to the responsibility of our stations, to the obligation of our oaths, and the rights of the people and their posterity, to be turned aside from what we believe to be the post of duty, by any consideration of the consequences that may arise from continuing in it.

Let all these cases be patiently examined, and we think it will be seen that their analogy is not complete; that they may still exist, and the powers under them be rightfully exercised, notwithstanding the decision in the present case.

The first instance is the stay of execution, which justices are allowed to grant on judgments rendered by them. But here the creditor is not concluded; he may appeal to the county court. Besides, the constitution of the U. S. in the section under consideration, employs the future tense, "No State shall pass laws," &c. It does not repeal those conflicting laws which were then in force; though several of the States did in obedience to its spirit, forbear to re-enact laws in hostility with it. The law giving this power to magistrates was enacted long before the constitution was adopted.

Another example cited is that of the power constantly exercised by a court of chancery, in giving time to a mortgagor, on a bill filed against him to foreclose, to pay the debt before the decree is made absolute, or the land ordered to be sold.

Such a power has been exercised by that Court from

very ancient times, and was one of the modes of administering a remedy on those contracts, known to the parties when they entered into it, and it is a necessary consequence of the principles on which the constitution of the Court compels it to decide the rights of parties to a mortgage.

It is also in strict conformity with natural justice, for the land mortgaged being only a collateral secury for the payment of the debt, and so understood by the creditor, he cannot be injured if his debt and interest are paid. It is upon the same principle, that a Court of Chancery exercises its jurisdiction of relieving against a penalty; because it is designed to secure the payment of money, and the Court allows the creditor all that he expected when he made the contract. The intention of the parties is in all respects effectuated; and the obligation of the contract is enforced, precisely in the way, both creditor and debtor knew it might be enforced when they entered into it. Another point of view may probably render the subject clearer. Such an order in the Court of Chancery is not at all directed against the contract; but it is the answer of the Court to a mortgagee, who brings his bill against the mortgagor, on whom it prays the Court to lay hands, and make him if he intends to redeem, to do it then, or ever after remain silent. When the Court, therefore, is applied to for the purpose of lending its aid to an individual, in a matter which he deems necessary for his peace, it is clearly in its power to say upon what terms such interposition shall be extended. With the utmost propriety, then, the Court answers it cannot be that a decree of foreclosure shall be made in the case, without giving reasonable time to the mortgagor to redeem." If there are special cases in which a Court of Chancery gives further time upon a bill to redeem, it must be upon the ground that the substantial understanding and agreement of the parties is that of a security for the money and the interest accruing, without having reference to any particular day of payment, and that the safety of the debt is only intended to be provided for by the mortgage. Hence the mortgagee

takes a bond for the debt, and the existence of the mortgage is no objection to the recovery of the debt. The giving further time on a bill to redeem has no influence on the bond, nor does it affect any proceeding to recover the debt in a Court of law. Both jurisdictions move distinctly within the sphere of their respective orbits. The Court of Equity applies itself to the conscience of the party, requiring of him substantially to accept and perform what he originally expected, and what was intended by both parties; thereby enforcing rather than impairing the contract.

The act of 1789 has been pointed out to the notice of the Court, as containing a similar exercise of Legislative power with the one under consideration. That act provides that no execution shall be levied on property of a minor in the hands of his guardian, until twelve months after a judgment on the *scire facias.*

An examination of the purview of this law will shew that it is supplementary to the act of 1784, by which a remedy is given against heirs, not formerly possessed by the creditor. The heir was at first liable only where he was expressly bound in the obligation of his ancestor, and had also assets by descent. By these laws, which must be construed together, the land in possession of the heir is made liable to creditors after the personal estate is exhausted. That a new remedy given by the Legislature, should be qualified and limited in any way they deem expedient, seems perfectly unexceptionable. Besides, to whom is the indulgence extended? To minors, whose rights the common law, even to a greater degree than equity, has always cousidered as under its peculiar protection? Its language is "in the case of infants the parol is to demur, and the infant is not bound to answer till full age, and the register, parliament and common law give no execution against an infant heir, although the debt were clear and indisputable as by a judgment or statute." 2 *Treatise on Eq.* 268.

The right to pass this law is further derived from the 5th section of the Declaration of Rights, "that all power of suspending laws or the execution of laws, by any authority

without the consent of the representatives of the people is injurious to their rights and ought not to be exercised."

This article, like several other excellent ones in the same instrument, is taken *mutatis mutandis* from the Declaration of Rights, established by the Parliament of England at the beginning of the reign of William III, and was especially designed to secure them against a branch of prerogative, which though exercised by the regal authority, from the time of Henry, III, had been employed in the preceding reign, in a manner the most odious and oppressive. With the example of the revolution in England, and the causes producing it, fresh in their remembrance, the convention of this State raised this bulwark against a similar assumption of authority. But the term "laws" must signify such acts as the Legislature have authority to pass, for that cannot be called a law, which the constitution has forbidden to be enacted. The term "suspend" implies that the act suspended, once had an effectual and constitutional existence. So that if before the adoption of the federal constitution, the Legislature had passed an act inconsistent with the constitution of the State such act could not claim the authority of a law. If, for example, they had directed the judiciary to try all criminals without the intervention of a jury; if they had declared that certain acts theretofore done, and lawfully done, should nevertheless be punishable; that no prisoners should be bailable; it would, we apprehend, have been the sacred duty of the judiciary to refuse to execute such acts. The persons who have filled that department, from the cessation of the colonial government to the present time, have acted in conformity with this principle, as the judicial records of the country testify. A law is defined a rule of action commanding what is right and prohibiting what is wrong. But the rule prescribed in the supposed cases, would have commanded what was wrong, and prohibited what was right, according to the fundamental law.

Every article in the Declaration of Rights as well as the constitution of the State, is subject to the paramount control

of the constitution of the United States, which, being the last solemn expression of the will of the people, annuls and destroys every thing clearly irreconcilable with it.

The definition of a contract, as given by M. Pothier, a writer on the civil law, is quoted to shew that the time of payment is not of the essence of a contract. The writers on that law have made various subtile distinctions relative to the qualities of a contract; but as we cannot perceive that any inference can be drawn from the words of Pothier applicable to this subject, except such as other parts of the work explain away, a very brief notice of it will be sufficient. His words are, "there are three different things to be distinguished in every contract; things which are of the essence of a contract, things which are only of the nature of the contract, and things which are merely accidental to it." After explaining at length the essence and the nature of the contract, he illustrates what he means by the accidental things, which, he says, are only included in the contract by express agreement. "For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it, without being particularly expressed." The just inference from this passage is, that even the accidental things, if inserted in the contract, form a part of its obligation. That the civil law viewed them in this light, is evident from other parts of the same writer, where he distinguishes between a term of right and a term of grace; the first making a part of the agreement, the latter not. 1 Pothier, P. II, Cha. 3. 131, Evan's translation.

To this statement of the reasons why the analogy of the cases relied upon, appears to us imperfect, it is only necessary to subjoin this general remark, that none of them have been directly brought into judgment; and if they should appear to be infringements of the constitution, it cannot follow that the acquiescence in them will justify a repetition. The construction we give to the constitution would have been

adopted by us from a consideration of the instrument itself; but we think it fortified by the collateral illustrations furnished by the other ground of our opinion.

2. It is to be seen in the historical records of some of the States, that, pressed and exhausted by their efforts in the great struggle for independence, they had recourse to various expedients to relieve their suffering citizens. In addition to the issue of bills of credit and paper money, some laws were passed wholly changing the nature of the contract; others postponed the payment of debts, by authorising it to be made in instalments. The benefit resulting from these measures was partial and temporary; but the evil, as might have been expected, universal and permanent. Testimonies of this might be adduced from various authorities; but it may be sufficient to cite the work of the able historian of South Carolina, whose various labors in the cause of literature, entitle him to the gratitude of the country. As the work of this gentleman may not be in the hands of every one who may desire to know the grounds of our opinion, such parts of it will be transcribed as immediately relate to the subject.

"The people of South Carolina had been but a short time in the possession of their peace and independence, when they were brought under a new species of dependence. So universally were they in debt beyond their ability to pay, that a rigid enforcement of the laws would have deprived them of their possessions and their personal liberty and still left them under incumbrances; for property, when brought to sale under execution, sold at so low a price as frequently ruined the debtor without paying the debt. A disposition to resist the laws became common. Assemblies were called oftener and earlier than the constitution or laws required. The good and evil of representative government became apparent. The Assemblies were a correct representatation of the people. They had common feelings, and their situation was in most cases similar. These led to measures which procured temporary relief, but at the expense of the permanent and extended interests of the community. Laws were

passed in which property of every kind was made a legal tender in the payment of debts, though payable according to contract in gold or silver. Other laws installed the debt, so that of sums already due, only a third, and afterwards only a fifth, was annually securable in law." After stating the emission of paper money he proceeds thus:

"The effects of these laws interfering between debtors and creditors were extensive; they destroyed public credit and confidence between man and man, injured the morals of the people, and in many instance ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward. The procrastination of payment abated exertions to meet it with promptitude. In the mean time, interest was accumulating and the expenses of suits multiplied by the number of instalments." He then states the necessity of the constitution of the United States, the objects provided for by it, and particularly recites the clause under consideration; after which he proceeds; "Their acceptance of a constitution, which among other clauses contained the restraining one which has been just recited, was an act of great self denial. To resign power in possession, is rarely done by individuals, but more rarely by collective bodies of men. The power thus given up by South Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years; for in them she passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future Legislatures, so as to deprive them of the power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the State of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used." Upon examining the laws of South Carolina, it appeared that the last act alluded to by the historian, as interfering between debtor, and creditor was pass-

ed the 4th November, 1788. It provides that all debts (with various exceptions) contracted previous to the 1st Jan. 1787, shall be recoverable in instalments, only one fifth to be payable annually on the 25th March in each succeeding year, until the whole is paid. The law also authorises the creditor to demand security.

In the course of an animated picture, traced by the historian, of the effects of the new constitution, he remarks—"Public credit was reanimated. The owners of property and holders of money, freely parted with both, well knowing that no future law could impair the obligation of contracts. 2 Rams. Hist. S. C. pa. 433. In page 440, the same author, in describing the effects of the embargo of 1807, remarks: "Though the prohibition of exporting the valuable commodities of the country, reduced their price one half, yet the courts and the Legislature firmly resisted all attempts to obstruct the legal course of justice in favor of debtors. The forbearance of the creditor part of the community generally afforded a shield to property bound by judgments and executions, which without violating the constitution, protected it more effectually than the instalment laws, which had been too easily passed in the period of disorganization preceding the establishment of energetic government in '89."

No comment on these extracts is necessary to prove that, in the opinion of the writer, the instalment law could not have been re-enacted after the adoption of the constitution. They may also be fairly considered as furnishing evidence of the sentiments of a respectable State on the same subject, expressed at two different periods, a State which has always abounded with able men at the bar, on the bench and in the Legislature.

The same opinion is to be collected from the debates in our convention in 1778, as having been entertained by some eminent citizens, who assisted in forming the Constitution, and were present at all the discussions it underwent in the general convention. Whoever will compare an instalment law with a suspension, at the time of their enactment, will probably be induced to give the preference to the former, in

relation to the rights of a creditor, and to conclude, if the former violates the constitution, *a fortiori* the latter does so.

We have thus given the reasons of our opinion, with as much clearness and brevity as the many important causes pressing upon our attention would enable us to do in the intervals of adjournment. For, until the present term, we knew not the opinions of each other. We should have rejoiced if this judgment could have been put in a course of revision before a superior tribunal, or that so interesting a question could have been decided, for the first time, by Judges of more skill and learning than we pretend to possess. Such as it is, we submit it to the candor and good sense of our fellow citizens, who although they may think us in error, to which we are subject in common with the rest of the human family, will do us the justice to believe that such error is neither wilful or agreeable. We have discharged what we believe to be an imperious duty to our country, and the *mens conscia recti* forms our consolation and support.

NOTE.—See *Berry* v *Haines*, 2 Car. Law. Repos. 428, which decides that where a party had obtained a suspension of an execution by giving bond under the act, the bond might be enforced by the creditor in the manner pointed out in the act.

ADJUDGED CASES IN THE

SUPREME COURT OF NORTH CAROLINA.

RUTHERFORD *vs.* ALLEN, SHERIFF OF LINCOLN COUNTY.

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A sheriff may surrender a person whom he has taken under a *ca. sa.* to the court whence the writ issued at the return term thereof, and have the surrender entered of record, without giving notice of it to the plaintiff in the execution.

A sheriff may confine, in the prison of his own county, a person arrested by him on a *ca. sa.* but he cannot imprison him in the county whence the writ issued. Nor can the sheriff of the county whence the writ issued imprison a person surrendered on the return of the *ca. sa.* unless a *committitur* be entered of record.

This was an action of debt for the escape of William Farquhar, who was arrested by the defendant on a *Ca. Sa.* regularly issued at the plaintiff's suit. A verdict was found for the plaintiff under the direction of the court. The following reasons were filed in support of a motion for a new trial, which was overruled by the court: from which judgment the defendant appealed to this court.

1. Misdirection of the court, who decided and gave in charge to the jury that the delivery of the prisoner Farquhar up to the Court at the return of the *Ca. Sa.* was not such as to discharge the officer. Though it appeared that the officer gave him up at the return term into open Court, and an entry appears on the minute docket in the following words: "The sheriff of Lincoln comes into open court and surrenders William Farquhar, whom he had taken upon a *Ca. Sa.* at the suit of James Rutherford."

2. The court left it to the jury to infer from parol evidence whether Patterson who served and returned the *Ca. Sa.* was deputed, no evidence appearing that any written authority existed.

3. If it had been known to have been necessary to make

the surrender a good one to discharge the officer, to make it known to the plaintiffs or to the sheriff of this court, he could have proved what is set forth in the annexed affidavit. He was therefore as to this point surprised, &c.

Lowrie, J. delivered the opinion of the court.

By the act of 1777, chap. 8, sec. 5, every sheriff, by himself or his lawful deputy, is bound to execute all writs or other process to him lawfully issued and directed, and make due return thereof.

The first question then presented to the court by this record is, has the defendant, the late sheriff of Lincoln county, to whom the plaintiff "legally issued and directed" a writ of *capias ad satisfaciendum* against Wm. Farquhar returnable to the county court of Rutherford legally executed and returned the same? In order to arrive at a correct solution of this question, we must enquire what is commanded by the writ. The mandate of the writ is, that the sheriff take the body, safely keep, it, and have it before the County Court of Rutherford on a certain day therein specified. The defendant then answers, and says, the plaintiff ought not to have and maintain, &c. his action thereof, &c. for that it appears by the Record of the County Court of Rutherford that "the sheriff of Lincoln County comes into open court and surrenders William Farquhar whom he has taken upon a *Ca. Sa.* at the suit of Jas. Rutherford."

It is objected that this is not a good return in exoneration of the sheriff, the defendant; for that it does not appear that notice was given to the plaintiff of the time of the surrender, or of the time of the return of the writ. We are all of opinion that this objection is not sustainable.

Notice can only be necessary in any case where it serves to give information to the party claiming the benefit of it, of some fact or circumstance without which he could not legally be presumed to have knowledge. That is not the case here. The writ of *Ca. Sa.* was issued by the plaintiff himself; it would be idle therefore to say he was entitled to notice of the time when the writ of *Ca. Sa.* was returned, and

when the debtor was surrendered. This case differs from that of bail surrendering their principal to the Court in discharge of their undertaking. Bail have the right of surrendering their principal in discharge of themselves at any time, but of the time when they make such surrender the plaintiff cannot be presumed to have any knowledge; he is therefore in such case entitled to notice that he may have an opportunity to move the court to have his debtor committed, or take such other steps as he may deem right and proper.

We are also of opinion that this is a good surrender and return in exoneration of the sheriff, the defendant, upon another ground. This writ issued from, and was made returnable to the County Court of Rutherford, and was directed to the defendant, then sheriff of Lincoln county, commanding him to have the body of the plaintiff's debtor before the court from whence the writ issued to pay to the plaintiff, &c. The mandate of the writ the sheriff was strictly bound to obey, but his authority extended no farther.

Although a sheriff by virtue of a *Ca. Sa.* may confine a debtor within the walls of the public prison of his own county for safe custody, because by virtue of his office of sheriff he is the keeper of said prison, yet he has no authority *ex-officio* to imprison in the jail of another county. Nay, indeed the sheriff of Rutherford County, in this case, would not have been justifiable in imprisoning the said Wm. Farquhar unless a *committitur* had been entered of record.

It was the duty of the plaintiff to have been present in court on the day of the return of the writ, and surrender of the body of his debtor by the sheriff; and to have moved the court for his commitment; or to have taken such other steps as he might have deemed most likely to have ensured or enforced the payment of his judgment.

Let the rule be absolute.

Note—See *Spencer* v *Moore*. 2 Dev. & Bat. Rep. 264.

PEARSON *vs.* FISHER. Page 460.

The verdict of a jury summoned by a sheriff to find whether goods belong to the defendant in an execution, cannot bind the rights of the litigating parties, and can only have the effect to satisfy *himself* on the question of property; to govern his discretion in the exercise of his office; to excuse him for returning "*nulla bona*," and to mitigate the damages in an action of trespass, should the goods taken not belong to the defendant.

It seems that the plaintiff in an execution may sustain an action against a sheriff, who refuses to sell property, because a jury has found that it does not belong to the defendant, if in fact it was his; but if the plaintiff offer the sheriff an indemnity, the action certainly may be maintained.

A parol gift of a slave by a father to his son is void under the act of 1784 (1 Rev. Stat. ch. 37, sec. 19) as against creditors.

On a special verdict the jury find that Joseph Haiden on the 28th day of April, 1786, executed a bond to the plaintiff in the penal sum of two thousand pounds, hard money, conditioned for the payment of one thousand pounds like money on or before the 1st day of March, 1787. That suit was brought on said bond in Salisbury Superior Court of Law, returnable to September term, 1803, and judgment recovered by the plaintiff thereon at term of said court 180 , for the sum of £2500, and costs, upon judgment execution issued, returnable to September term of said court, 1806, against the goods and chattels of Joseph Haiden, dec'd. in the hands of his testator Margarett Brown, which was delivered to the defendant, then acting as sheriff of Rowan County, who levied the said execution (among other things) upon a negro fellow named Isham, then in possession of Margarett Brown, executrix of the last will of Joseph Haiden deceased, the aforesaid obligor. They find that the defendant advertised the sale of the said negro fellow Isham, under the execution aforesaid, and on the day appointed for the sale the said negro was claimed by Robert Haiden, one of the sons of the said Joseph, deceased, whereupon the sheriff summoned a Jury to try the right of property in the said negro, and the said jury so summoned being duly sworn, did

find that the said negro was not of the estate of Joseph Haiden, deceased, but belonged in absolute property to Robert Haiden his son, under and by virtue of a gift made by the said Joseph to the said Robert. They find that the plaintiff had not notice of this inquisition, that the same was *ex parte*, and took place on the 28th April, 1806.

They further find that upon the finding of the jury, the defendant discharged the said negro so previously levied upon: and that on the 10th May following, the plaintiff tendered to the defendant a bond of indemnity, and requested him to make sale of the said negro under the execution aforesaid, and that the defendant refused to accept said bond or make such sale.

They further find that the sheriff returned upon the said execution, that the same was satisfied as to part, viz. £1089 10 0, by the sale of sundry negroes mentioned in a schedule annexed to said return: and that the balance of the execution remained unsatisfied, no more property being to be found.

They further find that in the year 1798, Joseph Haiden aforesaid, being possessed of the said negro Isham, as if his own proper goods and chattels, made a gift of him to his son Robert, then a minor and being with his father: That Joseph Haiden continued to keep said negro in his possession until his death, and by his last will bequeathed said negro to his son Robert, who was still living with his father.

They further find that at the time of making the gift aforesaid, and continually up to the time of the death of the said Joseph Haiden, he was possessed of personal estate more than sufficient to pay all his debts, and was seized of real estate, unincumbered, of the value of two hundred and fifty pounds.

They further find that the gift of the said negro was made bona fide, except the circumstance aforesaid do in law make the same fraudulent. And that on the 10th day of May, 1806, he was of the value of two hundred and twenty-five pounds.

They further find that the defendant since the 10th May, 1806, for a valuable consideration, purchased the said negro Isham of the aforesaid Robert Haiden, and hath conveyed him away beyond the process of this Court. But whether under these circumstances the plaintiff is entitled to recover, the Jurors aforesaid are ignorant, and pray the opinion of the Court. If the court should be of opinion that he is entitled in law to recover, then they find for the plaintiff, and assess his damages to two hundred and twenty-five pounds and costs of suit.—But if the court should be of opinion that the plaintiff is not so entitled, they then find for the defendant.

CAMERON, J. delivered the opinion of the Court.

The facts found in this case, out of which the questions submitted arise, are these—that Joseph Haiden, on the 28th April, 1786, executed a bond to the plaintiff, in the penal sum of £2000, conditioned for the payment of £1000 on or before the 1st May, 1787—that the plaintiff recovered judgment for the penalty of the bond, on which execution issued returnable to September term, 1806, at Salisbury Superior Court, and was put into the hands of the defendant, then being sheriff of Rowan, who levied it on sundry Negroes, and among others on one named *Isham*, then in the possession of Margaret Brown, executrix, &c. of the said Jos. Haiden.

The defendant advertised the sale of the said negro Isham, under the execution and levy aforesaid. On the day of sale, Robert Haiden, a son of the said Joseph Haiden, claimed the said negro Isham; whereupon the defendant impannelled a Jury to try the right of property, in said negro, who found that the said negro was not of the estate of the said Joseph Haiden, but belonged, in absolute property, to the said Robert Haiden, by virtue of a parol gift, made by the said Joseph, to the said Robert, in 1796. The plaintiff had no notice of the inquisition; it was *ex parte*, and took place on the 28th April, 1806. The defendant discharged the negro on the finding of the Jury. On the 10th May following, the plaintiff tendered to the defendant a bond

of indemnity, with sufficient security, and required him to sell the said negro Isham, under the execution aforesaid. The defendant refused to accept the bond, or to sell the negro—He returned the execution, satisfied as to £1089 10s. by the sale of sundry negroes not including Isham. That the balance of the execution remained unsatisfied, "no more property being to be found."

That at the time of the gift, Robert was a minor, and lived with his father, who continued to keep possession of the negro till his death. By his last will he devised the said negro to his son Robert, who continued to live with his father till his death. That at the time of the gift, and continually after the time of his death, the said Joseph Haiden was possessed of personal estate more than sufficient to pay all his debts, and was seized of real estate, unincumbered to the value of £250.

Out of the preceding statement two questions arise.

1st. Is the verdict of the Jury, finding the right of property in the negro Isham to be in Robert Haiden, and not in Joseph Haiden, conclusive against the plaintiff, so as to bar his action against the defendant?

2d. If the verdict of the Jury be not conslusive, was the gift of the negro by Joseph Haiden, to his son Robert, fraudulent in law, and therefore liable to the plaintiff's execution?

As to the first, it may be proper to remark, that the office of sheriff has many duties of high responsibility attached to it, in the furtherance of which, error or a mistake of the law on the part of the sheriff, may involve him in difficulty, and subject him to loss; but in the performance of all official acts the sheriff must act at his peril. Gilbert, in his treatise on executions, 21, says, "the sheriff is bound at his peril to take only the goods of the defendant; and if he doubt whether the goods shewn him be the defendant's, he may summon a jury *de bene esse* to satisfy himself whether the goods belong to the defendant or not. This will justify him in returning, that the defendant has no goods within his bailiwick, and mitigate damages in an action of tres-

pass, if the goods seized should not happen to be the defendant's.

The only effect then, which such an inquisition can have, is to satisfy the sheriff *himself* on the question of property; to govern his own discretion in the exercise of his office; to excuse him for returning "nulla bona," and to mitigate the damages in an action of trespass, should the goods taken not belong to the defendant, as supposed by the finding of the Jury; but not to conclude the plaintiff in execution from shewing that the property levied on, did in fact belong to the defendant, in opposition to the verdict of the jury.

In 6th Term. Rep. 88, *Roberts* v *Thomas*, in speaking of a similar case, Lord Kenyon, Ch. J. says, "this is a kind of inquest of office; it is merely to indemnify the sheriff in making his return to the writ; but it does not bind the right between the litigating parties."

Had the plaintiff in execution been present when the Jury were impannelled, to try the question of property, if he had been afforded an opportunity of disproving the claim set up to the negro, by Robert Haiden, and if he had been fully heard on that occasion, and the jury had, after hearing both sides, found a verdict in favor of Robert, then there would be more plausibility in the position that the finding of the Jury should be conclusive between the plaintiff and the sheriff—but it would be in violation of the first principles of law and rational justice, to conclude the plaintiff on a question where he was neither heard, nor had any opportunity of being heard, as the case states that he had no notice of the inquisition; and that it was entirely *ex parte*.

But admitting that the plaintiff had been duly notified of, and present at the taking of the inquisition, still it is not conclusive as to him—the right decision of most questions of property, depends on the interpretation of the rules of law applicable to each particular case; which questions can be properly tried only before courts of justice of competent skill to expound and enforce the rules of law. The inquisition held by jury, affords an opportunity for the application of the rules of evidence and of law pertinent to the

case—and the party aggrieved by their decision, having no right to appeal from it, *would be without remedy*, if such decision should be conclusive. Such an inquisition can serve only to indemnify the sheriff in making his return, but it does not bind the right of the litigating parties.

The plaintiff having offered the defendant sufficient indemnity for selling the negro, and he having refused to accept it, and to sell under the execution leaves him entirely without excuse. On the first point, therefore, the court is of opinion that the finding of the Jury is not conclusive in favor of the defendant in this action, and that the plaintiff was not bound by it, from shewing that the property of the negro was in Joseph Haiden.

As to the second question the court is of opinion, that the gift of the negro in question by Joseph Haiden to his son Robert, was fraudulent in law, and void against the rights of the plaintiff, and liable to his demand. The grounds on which this point is decided are fully explained in the case of *Sherman* v *Russell*, decided at this term; and a repetition of them here is deemed unnecessary.

Judgment for the plaintiff.

Note.—On the 1st and 2d points, see *Yarbrough* v *State Bank*, 2 Dev. Rep. 23; and on the last point, see the cases collected in the note to *Farrell* v *Perry*, 1 Hay. Rep. 2, and also the cases of *Peterson* v *Williamson*, 2 Dev Rep. 326, and *Harris* v *Yarbrough*, 4 Dev. Rep. 166.

SLOCUMB *vs.* ANDERSON—Page 466.

A judgment confessed in vacation and then entered up by consent, as of the preceding term, is void and cannot be validated by any subsequent act of the defendant.

This cause came up from Cumberland Superior Court, upon a rule to shew cause why a judgment entered up against the defendant in that court should not be set aside for

irregularity. To the transcript were annexed letters and affidavits tending to illustrate the transaction and explain the circumstances under which the judgment was entered, but it is deemed unnecessary to insert them here, as the several parts which had any influence on the judgment of the court are adverted to in their opinion.

The case was argued by *Strong* for the defendant and *Browne* for the plaintiff.

SEAWELL, J. delivered the opinion of the court.

This is a rule to set aside a judgment which, upon the face of the record, appears to have been entered at the Fall Term, 1810, of the Superior Court of Cumberland County. The irregularity complained of is, that the judgment never was taken in term time, but really was confessed out of court in the month of January, 1811, and entered by consent in vacation, as of the preceding term. This allegation on the part of Anderson, is *supported* by his own affidavit, and corroborated by a letter from him to the plaintiff's agent, and produced by the agent in shewing cause against this rule. It is moreover to be observed, that room was allowed both parties to make or produce affidavits; and the facts in Anderson's affidavit being stated to be within the knowledge of Winslow, the plaintiff's agent, and if they were untrue should be denied by the agent. From this view, therefore, it seems clear that the entry upon the records was in vacation, and as of a term preceding the time of entering.

In support of this entry, as a judgment it has been contended, that the party by his own act has justified and authorised the entry upon the records, and that he ought not now to be heard when he endeavors to avoid it, unless he shall show equitable grounds. That as the court is *called* upon to act, the applicant in such case should have merits on his side, or the court should *not listen*. And it is further contended, that such judgments are in conformity with the English practice.

With respect to the merits of the applicant, we are all of opinion that if the entry of a judgment under the circum-

stances of this case could have any validity; that *being so bound*, and by his own consent, we would not release him but upon its appearing essential to justice. But we think in this case, that the whole entry and confession were totally void, and are utterly incapable of being made valid. No acquiescence, nor admission, or acknowledgment of the party being any more competent to validate, than the first acknowledgment was to create. The cases cited from the English practice do not bear out the present. The judgments in their courts entered up in vacation, were either founded upon proceedings acfually had, in which a rule had been made for such judgment, or in virtue of powers of attorney for that purpose; in this case there was no previous proceedings, nor was there any power of attorney: the parties undertake to constitute themselves into a court, and the debtor confesses judgment before the agent of the plaintiff.

Wherefore we ore of opinion, that the rule be made absolute, and that the entry of the judgment be vacated.

NOTE.—See *Matthews* v *Moore*, 2 Murph. Rep. 181. *Winslow* v *Anderson*, 3 Dev. & Bat. Rep. 9.

SHERMAN *vs.* RUSSELL—Page 467.

A parol gift of slaves by a father to his child is void under the act of 1784 (1 Rev. Stat. ch. 37, sec. 19) as against creditors.

Detinue for negro George.

Michael Sherman, about twelve years ago made a parol gift and delivery of the negro in question, to his daughter Elizabeth. At the time of the gift made, the said Michael was owner of four or five other negroes, two hundred acres of land, with a plantion on which he lived, and a small quantity of household furniture. There was no evidence of his being indebted to any person at the time of the gift,

nor any evidence of an intent to defraud; but it was proved that the motive of the gift was to provide for his daughter, who was a cripple. The negro, as well as the child, lived with, and remained in the possession of, the said Michael until the sale hereafter mentioned, the said Elizabeth being then still an infant. After the gift aforesaid, Michael Sherman became indebted, and judgment and executions to the amount of £130, or thereabouts, were obtained against him about four years after the gift, which executions were levied on the negro in question and sold by the constable, to satisfy the aforesaid executions, at the price of $555; but failing to pay the money, the negro was set up again and bid off by William Dickens at the price of $549, but for the benefit of the plaintiff—the plaintiff had the interest and benefit of the executions—no money paid at the time of the purchase, but finally all paid—one hundred dollars of which was paid to Michael Sherman, by the hire of the said negro for one year. At the time of the sale the negro was claimed on behalf of the said Elizabeth under the gift mentioned. Mary Bressir, then Mary Sherman, the mother of Elizabeth, who claimed the negro for her daughter, bid for him, to save him, as she said, for her daughter. At the time of the sale Michael Sherman was possessed of two other negroes, the land, plantation, and household furniture before mentioned; and at the time of his death, which happened shortly afterwards, he left property sufficient to pay his debts. The defendant held possession of the negro under Elizabeth to whom the gift was made, and got possession about eighteen months before the commencement of this suit. Elizabeth at the trial, was between twenty-three and twenty-four years of age. The plaintiff remained in possession of the negro, except the year he was hired as aforesaid, until he came to possession of defendant. The judgments were not given in evidence, but the executions. The judgments were in possession of the constable, who was dead; and diligent search for them had been made, and they could not be found.

If the Supreme Court should be of opinion the sale under the executions was valid, then a new trial to be granted, but if not, the verdict to stand.

SEAWELL, J. delivered the opinion of the court.

This is an action of detinue to recover a slave which the plaintiff bought at a sale, made by a constable, in virtue of an execution against the goods and chattels of Michael Sherman.

It appears from the case stated, that the slave in question once belonged to Michael Sherman, who, sometime antecedent to the contracting the debt which it was sold to satisfy, gave the same to his daughter by parol. That the daughter was then an infant of tender years, and a cripple: That both the daughter and slave continued with the father, who was not indebted at the time of the gift; and that at the time of his death, his estate was amply sufficient for all his creditors.

The jury, under these circumstances, found a verdict for the defendant, and the case comes into this Court upon a motion for a new trial.

If it became necessary in the present case, to consider the effect of the gift, in opposition to the claim of a creditor, upon common law principles, it would be important to enquire into the motives which induced the father to make the gift. It would then be proper to consider why a father, if he was in no dread, or expectation of future insolvency, or had no design of defrauding a subsequent purchase, should (unnecessarily, as regarded the situation of his child,) place beyond his legal control, property which he continued to possess and enjoy, by conveying it to an infant incapable of using it, and which, at that time of life, in no respect required such assistance, nor was in reality benefited by it.

But, in the present case, we are relieved from this necessity, as we are all of opinion that the gift, *not being in writing*, is, as to a creditor, void by the act of 1784.

That act, it is true, does not in express words declare that a parol gift shall be void, as to a creditor; yet such inference is clearly deducible from the design of the framers, and falls within the legal import of the expressions used. The preamble declares, that whereas many persons have been injured by secret deeds of gift to children and others, and for

want of formal bills of sale, and a law perpetuating the same; the Legislature then declares in general terms, as a remedy for the evils, that *all sales shall be in writing*, attested at least by one credible witness; and that all bills of sale for negroes and deeds of gift of any estate, of whatever nature, shall be recorded in nine months, or the same shall be void. To give effect to the parol gift in the present case, would be expounding the act to protect a parol gift against a creditor, whilst a parol sale, though for full and valuable consideration, and attended with possession, would be void. The design of the act was to protect persons who had suffered, and were still liable to be injured from the existing laws; those persons were creditors or purchasers, none others were capable of being injured. The cause from whence the mischief resulted, was the secret conveyancing of slaves from one individual to another, and for want of formal bills of sale and a law perpetuating the same. The *intention* of the legislature manifestly reaches the present case, and we are satisfied it is within the import of terms employed. Added to this is a series of adjudications in the courts of this State, from the year 1796, to this time, many of which have received the sanction of that justly celebrated lawyer, Mr. Justice Haywood, whilst he presided on the bench. Fortified in our own with the opinion and repeated dicisions of so great a judge, we have the less difficulty in saying the verdict was wrong. A different construction would be sticking to the *letter* of the act, at the expense of the manifest *design*.

Wherefore we are of opinion the rule for new trial be made absolute.*

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* Judges Henderson and Cameron being employed whilst at the bar, as opposite Counsel for the parties, gave no opinion. Judge Henderson, however, did not coincide in the opinion of the court.

NOTE.—See *Pearson* v *Fisher* ante 460, and the note on the last point in that case.

STEPHENS'S EX'RS *vs.* SMART'S EX'RS—Page 471.

An executor may sue in this State upon letters testamentary issued upon a probate in another State.

The plaintiff's tessator was a resident of South Carolina, where he died, and where letters testamentary were granted to the plaintiff. The defendant's testator was an inhabitant of this State, and never resided in South Carolina. The question submitted, is, whether the action can be brought upon such letters testamentary.

Court. We are of opinion that the probate and letters testamentary issued in South-Carolina, are sufficient to enable the plaintiff to sue here. The constitution of the United States and the act of Congress made to carry it into effect, direct us to give "full faith and credit to the records, public acts and judicial proceedings" of other States. A probate is a judicial act of a Court, having competent jurisdiction, and while it remains unrepealed, completely authenticates the right of the executor.

Note.—But an administrator cannot maintain a suit here upon letters granted in another State. *Anonymous*, 1 Hay. Rep. 355. *Butts* v *Price*, Conf. Rep. 68. *Leake* v *Gilchrist*, 2 Dev. Rep. 73. *Nisbet* v *Stewart*, 2 Dev. & Bat. Rep. 24.

MASON *vs.* COOPER, BAIL &c.—Page 472.

The plaintiff in a *sci. fa.* against bail, is not bound to produce the bail bond on the plea of *nul tiel record.*

Cameron, J. delivered the opinion of the court.

The *sci. fa.* in this case is in the common form, to which the defendant pleaded "*nul tiel record.*"

It is only necessary to ascertain the legal meaning and extent of the plea, to decide whether the plaintiff is bound to produce the bail bond, or to account for the loss of it. The plea must be taken as an answer to the *sci. fa.* which recites *matter of record*, and only puts *such* matters in issue—such as the judgment against the principal, and the writ of *ca. sa.* But it is no answer to any other matter contained in the *sci. fa.* which is *in pais.* Although the act of Assembly directs the sheriff to take and return bail bonds, together with the writs, it does not make them matter of record; because it permits the person charged as bail to deny the execution of the bail bond, provided he supports his plea by affidavit. If they were matter of record, their execution could not be denied even on oath.

It follows, then, that as the plea in this case does not put the existence of the bail bond in issue, the plaintiff was not bound to produce it, or to account for its loss.

Judgment for plaintiff according to *Sci. Fa.*

M'CLURE *vs.* BURTON ET AL—Page 472.

Where several persons were sued in covenant, two of whom, on oyer had, appeared not to be parties to the deed, the plaintiff was permitted to amend by striking out their names on payment of all costs up to the time of amendment.

Covenant against Richard and James Bullock and others, and upon oyer being prayed and given to the defendants, they pleaded a variance between the writ and the deed declared on, in this, viz. that the defendants Richard and James Bullock were named in the writ, but were not parties to the deed. The plaintiff then moved to amend his writ by striking out their names; and it is referred to this court to decide whether such leave be given.

SEAWELL, J. delivered the opinion of the court.

We are of opinion that this case is within the scope of the latter part of the act of amendment of 1790, which gives power to the courts to amend imperfections, *defects* and want of form, upon such conditions as they may prescribe.

If the act did not allow an amendment in matter of substance, that part which allows an amendment would be perfectly inoperative; for, as to matters of form, they are *cured*, and need no amendment. The reasons for this exposition of the act are stated more at large in the opinion of the court in the case of *M'Neil & Davis* v *Evans and others*, decided at this term. But as the plaintiff must fail in the present action without the interference of the court, and as the defendants, according to the present construction of the action, would recover costs, the court, therefore, will not confer a favor on the plaintiff at the expense of defendants.

It is true, that if plaintiff has no cause of action, the defendants cannot be injured by costs; and that if the demand is just, the defendants should pay, or be compelled to pay, with costs. Yet, according to the present action the plaintiff has *no demand*, and it may be, for aught this court knows, that upon the allowance of the amendment, the defendants may make a tender with a profert—and they *might* have done so at first if they had been charged with a contract they *had entered into.*

Wherefore, we are of opinion, that the plaintiff be permitted to amend, upon the payment of all costs up to the time of amendment.*

* Henderson and Cameron, J. gave no opinion, being of opposite council; but both concurred in the opinion. Hall *hesitante.*

LORENT *vs.* POTTS Page 474.

No action can be maintained upon a charter party to recover freight, without the plaintiff's averring in his declaration, and proving on the trial that he had carried the goods according to the terms of the covenant.

This was an action of covenant, brought by the owner of the brig Susanna upon a charter party of affreightment, which after stating at full length and in the usual form, the freighting of the brig to the defendant for a voyage from Wilmington to Jamaica, and the delivery of the cargo there according to the bill of lading, proceeds thus: "Joshua Potts, hereby obligates himself, on delivery of said freighted cargo to his consignees at Kigston, and for and in consideration of services thus performed by the said owner, agent, or master of said brig &c. the said freighter will one day after the total discharge of said cargo, pay or cause to be paid to the same at Kingston, the following rates of freight." &c.

The question for the opinion of this court, was, whether the acts to be performed by the plaintiff formed a condition precedent, according to the true construction of the charter party; and as such ought to be averred and proved, to entitle the plaintiff to a recovery.

The case was submitted without argument.

SEAWELL, J. delivered the opinion of the Court.

We are all of opinion, that the plaintiff can maintain no action upon the charter party to recover the freight, without averring in his declaration, and proving on the trial, that he had carried the goods according to the terms of the covenant. And that, therefore, the rule for a new trial be discharged.

NOTE.—See *Parker* v *Gilliam*, 1 Iredell's Rep. 545.

PHILLIPS *vs.* SMITH, EX'R OF DRY AND HOODENPYLE *vs.* M'DOWELL'S EX'RS—Page 475.

Upon an eviction, the seller of land warranted, is liable only to the original value at the time of sale, that is, the purchase money with interest, and not to the increased value at the time of eviction, whether such increase of value arises from the ordinary and regular rise of property or from improvements or otherwise.

In these cases special verdicts were found; the material facts of the first of which were: That the plaintiff was evicted by lawful title from a tract of land, conveyed to him in 1781, by the defendant's testator, with a general covenant of warranty: that the purchase money of the land was £60, but that at the time of eviction in 1814, its value was £345, from the ordinary and regular rise of property.

In the other case, the verdict stated the land to be worth at the time of the purchase in 1796, £200, and at the time of finding, £750, including improvements.

TAYLOR, C. J. delivered the opinion of the Court.

The question we are called upon to decide in these cases is, whether upon an eviction, the seller of land is responsible, under his warranty, to damages to the amount of the increased value from the time of sale, and consequently for the improvements made on the premises; or whether he is bound to pay the purchaser only the value of the property at the time of sale? The British authorities do not furnish any direct decision upon this subject in relation to the action of covenant; and that it is not easy to deduce from any analogy they afford, the correct rule of adjudication, is proved by the diversity of opinion, prevalent in the American tribunals, where the question has occurred. It has been investigated by learned and laborious counsel, and illustrated by the researches of Judges of the highest order of intellectual excellence; yet in Massachusetts, Connecticut and South-Carolina, the rule is to allow the value at the time of

eviction; in New York, Pennsylvania and Virginia, the value of the land at the time of purchase, forms the measure of damages.

Equal difficulty, it is probable, was experienced on this subject in first laying down the principles of the civil law, a system generally characterized by its intrinsic excellence, and by being founded in many respects on the just grounds of rational jurisprudence. An arbitrary rule was resorted to, which limited the damages to double the value of the thing sold; but the avowed principle which gave rise to the rule, was not to bind the parties beyond what they might reasonably expect the damage to amount to, from the non-performance of the contract. The principle itself is certainly conformable to naturaly equity, although the rule built upon it, seems better calculated to put an end to strife and uncertainty, than to reach the merits of particular cases.

Indeed we cannot hope that the practical application of any rule will obviate all inconvenience and injustice; whether the damages be referred to the time of sale, or to the time of eviction. But mature consideration has convinced us, that to allow the purchaser the original value of the land, has the strongest sanction from legal analogy, is most consonant to the mild and temperate spirit of the common law, and less likely to produce public inconvenience or individual mischief, than any other rule we could adopt.

The latter consideration, it is true, ought never to influence a decision in cases where the law speaks a clear and explicit language; but no one will deny that it merits the highest attention, where neither scale of legal reasoning preponderates.

The only remedy by the ancient law, for a person claiming under a warranty, was the writ of *warranted chartæ*, in which, land itself was recovered, equal in value to the land sold at the time of sale.

There is no variance in the books upon this point. In a warranty to the feoffee made by the feoffor, if upon voucher, special matters be shewn by the vouchee, that when he entered into the warranty, the land at the time of the feoffment

was worth only £100, and now at the time of the voucher, it is worth £200, by the industry of the feoffee, the plaintiff in a *warranted chartæ* shall recover only the value as it was at the time of sale. *Jenk Cent.* 35.

If feoffor improve by buildings, yet dower shall be as it was at the seisin of the husband; for the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffor, than he would recover in value. *Co. Litt. note* 193.

The leading cases on this subject are copiously and elaborately stated by Mr. Luther Martin, in an opinion given by him, to be found in that useful work, Mr. Hall's Law Journal.

The *warrantia chartæ*, which was a mixed action, calling for judgment on the warranty, as well as for damages, has given place to the action of covenant, which pledges the personal as well as the real assets, to the performance of the covenants. In this respect the remedy is more effectual and obligatory than the ancient one; but there does not seem to be any adequate reason for adopting a different rule of compensation.

The real intention and honest understanding of the parties, ought always to be considered in expounding and enforcing their contracts. Nothing could be more unreasonasonable, than to interpose a mode of computing damages, which in all probability, was not contemplated by either of the parties at the time of contract, and which, if then brought into view, would have prevented its completion.

It is certainly repugnant to our ordinary conceptions of justice, that a person who sold land of little worth a few years ago, which now, by cutting a canal, or other expensive improvements, hath increased in value beyond all reasonable anticipation, should be liable to the purchaser to the full amount at the time of eviction. It would be doing violence to the spirit and general course of such transactions, to imagine that the seller, at least, calculated upon such a result.

He has no control over the conduct of the purchaser, who may conduct his improvements in any manner, and push them to any extent, which views of profit, pecuniary ability, taste, or caprice may suggest.

A wealthy man may purchase from one in moderate circumstances, a spot of ground on which he expends large sums of money, either with the view of commercial profit or in the gratificationof a luxurious and costly rage for improvement; and thus, when the defect in title is discovered the property is of greater value than the seller is able to pay. That the property should increase in value, and that the purchaser should improve it, were circumstances, which might have been reasonably expected by the seller; but it is difficult to believe, that he should, for an insignificant consideration have calmly calculated upon the total ruin of himself and family, in the possible event of a future eviction of the purchaser.

The truth is, that in fair sales, and to such alone can the rule now established apply, both parties have a confidence in the goodness of the title. The seller possesses no knowledge concerning it, which is not equally accessible to the buyer, who receives a warranty, that in the event of the title proving defective, he may be restored to the situation he would have been in, had he never purchased. If, according to the common apprehension of mankind, the purposes of a warranty were more extensive than this; if its design were to indemnify the purchaser for the loss of his bargain, and the value of his improvements, would it not be customary to require something more than the security of the deed, when it was intended to incur great expense in improvement?

Let the title continue unimpeached, the increasing value of the property is the gain of the buyer; the seller can claim no addition to the price. But if the title prove defective, the buyer will still recover the value of the land, as it was when he purchased, although it may be diminished at the time of the eviction. In both cases, the same rule of compensation should be applied.

Many cases have been stated, and may again be adverted

to, which demonstrate the extravagant hardship of a contrary rule.

Land is sold for a small price, on which, before eviction, a gold mine may be discovered, as in Cabarrus County; a flourishing town may be erected on it, as is the case in many parts of the State;—or it may become unexpectedly valuable for agricultural purposes, by being connected with a navigable stream, of which an instance occurs in that immense body of land, lying on Lake Phelps, and which, before the Canal was cut connecting it with Albemarle Sound, was held in comparatively small estimation. Indeed, without any extraordinary means of improvement, the increase in the value of lands, in many parts of the State, has been so great and rapid, as to baffle calculation, and deceive foresight.

Those who are conversant with Courts of Justice, know, that the early patents produced on trials in some parts of the State, have studiously left out lands then deemed of no value (not worth the taxes) which now, by draining, or in some instances, by the increased evaporations from clearing the grounds, have become the most productive.

Any other rule of computing damages, than that of the value at the time of sale, would, in our opinion, produce the most glaring injustice, and the wide spread ruin and impoverishment of families. Nor is the principle varied because the jury, in one of these cases, have found that the increased value of the land, arose from the ordinary and regular rise of property. Some rule must be established as a guide to the community; for it would produce endless inconvenience to constitute the jury chancellors in each particular case, and it is impossible to take any intermediate period between the sale and eviction.

We have adopted that which refers to the sale, from a belief that if the authorities do not amount to precise demonstration on the point, they at least raise a strong probability that the law is so; and because such rule appears to us equitable, rational, and most consonant to the views and understanding of the contracting parties.

Note.—See *Dickens* v *Shepperd*, 3 Murph. Rep. 526. *Wilson* v *Forbes* 2 Dev. Rep. 30. *Williams* v *Beeman*, Ibid 483. *Grist* v *Hodges*, 3 Dev. Rep. 198.

DAUGHTRY BY GUARDIAN *vs.* HAYNE'S EX'RS—Page 480.

The claim of the next of kin is from and through the administrator: but he cannot claim above him. Hence an action cannot be sustained under the acts of 1715 and 1793 (1 Rev. Stat. ch. 46, sec. 3 and ch. 81, sec. 1 & 2) by a person entitled to a distributive share of an intestate's estate, against the clerk of the county court, for neglecting to take an administration bond.

This was an action, on the case, brought under the act of 1793, which gives a remedy, by debt or case, to any person injured by the neglect, or misconduct in office, of any Clerk of the Superior or County Court, &c. Upon the trial of the cause in the Superior Court, the following facts were established by evidence, and the case was transmitted here with leave to plaintiff to enter a non-suit, if this court should think the action not maintainable; otherwise, judgment to be entered for the plaintiff.

James Daughtry, father of the plaintiff, died intestate, after which the defendant's testator as Clerk of Northampton County Court, issued a paper, purporting that one Joseph Daughtry was appointed administrator to James. No administration bond, however, was executed by Joseph; but he sold the personal estate of James, to one-seventh part of which the plaintiff is entitled, which with interest she claimed from the defendant. Except the letters of administration abovementioned, there was no evidence that Joseph was appointed administrator: no suit has been instituted against him by the plaintiff or any distributee, and the present suit was not commenced until after the death of the defendant's testatator. The whole of Joseph Daughtry's property had been sold under execution.

SEAWELL, J. delivered the opinion of the court.

It is unnecessary to examine whether the defendants are at all liable under the circumstances of this case; for we are all of opinion the present plaintiffs have no right to recover.

To maintain every action it is essential that the plaintiff

should have the legal right to the thing demanded. Upon the death of an individual intestate, his personal estate belongs to no one, till administration is granted. When granted the title has relation back to the intestate's death.

The administrator is the only legal owner; and he is in law accountable to no one but the creditor. The claim of the next of kin is from and through the administrator. This is an attempt to claim above him.

Whatever injury the estate of the intestate may have sustained; yet in point of law, none can be considered as entitled to satisfaction but the legal owners. If the law were otherwise, it would place it in the power of the next of kin, without security, and possibly insolvent, to obtain possession by suit at law, of the whole personal estate of the intestate.

The plaintiffs, therefore, having no right in law, we are of opinion there should be judgment for defendants.

SULLIVAN *vs.* MITCHELL—Page 482.

If in ordinary cases, the maker of a note has become insolvent, has absconded or refused to make payment, this will be sufficient to charge the endorser upon due notice of the fact.

A personal demand on the maker is not necessary; it is sufficient if it be made at his house, but if the house be shut and the maker gone away, some endeavours must be made to find him out.

Whenever a bill of exchange or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary whether the maker live at the same place or a different one.

A note made payable at a particular Bank must be demanded at the Bank, in order to render the endorser liable.

Indorsee of a promissory note against the indorser.

The note was made by John Mitchell, payable and negotiable at the bank of Cape Fear. When it became due, the holder was at Wilmington, where the maker had usually resided, but had not at that time any house or store there.

The defendant then informed the plaintiff, that the maker of the note was at sea, and that it would be hard if he himself should be obliged to pay the money, as he had already paid large sums for him.

No other demand was made on the defendant, nor was any other notice given to him: no demand was made at the Bank of Cape Fear, and the single question for the opinion of the court was, whether, under this statement of facts, the defendant was liable, as indorser.

The opinion was delivered by TAYLOR, C. J.

The nature of an indorser's engagement is, that he will pay the amount of the note, provided the holder cannot, after using due diligence, obtain payment from the maker; and that reasonable notice of this fact be given to the indorser, to enable him to charge the person against whom he is entitled to claim. Nothing should be neglected on the part of the indorsee, which might reasonably have been expected, to enable him to procure payment from the maker; if he refuse to make it, has absconded or become insolvent, and no delay occurs in apprizing the indorser of the fact, this, in ordinary cases, will be sufficient to make him liable to the indorsee's action. A personal demand is not essential, it being sufficient if made at the house; but if the house be shut and the maker has gone away, some further enquiry should be made concerning him, and some endeavor used to find him out, for he may have removed to another dwelling, and have been ready to pay the money. 2 Str. 1087. If it be proved that he has absconded, nothing more is necessary, when no particular place is pointed out for the payment of the money: here it is part of the contract that the money should be paid at the Bank of Cape Fear; the maker might have appointed an agent at the Bank to pay the money, or have deposited the amount to the credit of the holder. We cannot presume that this was not done, and as no application was made at the Bank, which every one receiving the note might see upon the face of it, was necessary, it would be unreasonable to charge the endorser. It is in the nature of a special acceptance, which, in the case

of a bill of exchange, the holder is not bound to receive, but having received it, he empliedly agrees to conform to it's terms. Thus, if a man accept a bill payable at his bankers, the holder must present it there within the usual banking hours; and if he present it afterwards without obtaining payment, it is not evidence of its being dishonored so as to charge the drawer. 7 East. 385. If a demand be made, at the place designated, although notice should be given to the indorser of the non-payment, yet no personal demand need be made of the accepter, who has broken his contract that the bill should be paid there. "If," says Marius, "a bill directs the payment at a certain place, it ought to be paid there, without other demand than at the place, though the accepter lives at a place remote." 26. And if he live in the same place, the law is the same as appears in 2 H. Bl. 509, where the person at whose house the bill was made payable, was himself the holder of it; in which case it was held a sufficient demand of payment for him to inspect his books and to find that he had no effects in his hands.

As the verdict below was improperly found for the plaintiff, there must be a new trial.

Note.—On the question of a demand on the maker, see *Moore* v *Coffield*, 1 Dev. Rep. 247. As to making a demand at the particular Bank where a note is made payable, see *Smith* v *McLean*, N. C. Term Rep. 72. Upon the question of giving notice to indorsers, see *Pons* v *Kelly*, 2 Hay. Rep. 45, and the cases referred to in the note. The act of 1827 (1 Rev. Stat. ch. 13, sec. 11) renders endorsers liable as sureties unless it is otherwise expressed in the endorsement. See the cases of *Williams* v *Irwin*, 3 Dev. & Bat. 74. *Dismukes* v *Wright*, Ibid, 78, and *Ingersoll* v *Long*, 4 Dev. & Bat. Rep. 293, decided upon this statute.

DEN ON THE DEM. OF STITH'S HEIRS *vs.* BARNES--Page 484.

Where a testator devised as follows : "I give and bequeath to the children of G. W. L. provided he has any, if not, to the heirs of my sister S. the land which lies between the road, &c." and it did not appear from the will that the testator knew of his sister S. being alive, *it was held* that the word "heirs" must be taken in its legal acceptation, and will not operate as a *descriptio personarum.*

Parol evidence is not admissible to shew that a devisor used the word "heirs" in his will in a different sense from the legal meaning.

This was an ejectment brought to recover a tract of land, claimed by the plaintiffs under the will of their uncle McKinnie Long; the material clauses of which are as follow: "I give and bequeath to the children of G. W. Long, provided he has any, if not, to the heirs of my sister Stith, the land which lies between the road, &c." *Item.* My brothers Richard and George Long are to pay out of the bequests I have made them, what debts I may owe." To his brother Richard he had previously devised a tract of land. The jury found, in a special verdict, that G. W. Long died before this suit was brought, without ever having had a child; that the testator's sister Stith is still alive, and that she, as well as her children, the lessors of the plaintiff, lived in the same neighborhood with the testator, who saw them almost daily; that the lessors of the plaintiffs are the only children Mrs. Stith had, either at the making of the will or at the death of the testator.

On the trial of the cause in Halifax Superior Court, the introduction of parol evidence was objected to, by which the knowledge of the testator, as to his sister Stith being alive, was proved to the jury. The admissibility of such testimony was one of the questions submitted to the Court.

The case was here argued by *Browne* and *Drew* for the plaintiffs, and *Daniel* for the defendant.

Seawell, J. In the argument which was made in this case for the defendant, it was contended that George W.

Long took an estate for life, by implication, on account of his being directed to pay the testator's debts "out of the bequest made to him;" and that the limitation immediately to his children, made it an estate tail, which by the act of 1784, became a fee simple.

Whether such effect resulted from the devise, or not, seems not material to consider. If such was the effect of the devise, it would then become necessary to enquire how the ulterior limitation would thereby be affected: for if by force of our act of Assembly of 1784, words, which before the act, gave an estate tail, are since made to pass a fee simple, why should not the ulterior limitation, upon an event which must take place during the life of George, be good, by way of executory devise? Upon this part of the case, however, no opinion is intended to be given, as we are all of opinion, the plaintiffs have no title. Nor does it, in my view, become important to decide the point in relation to the parol evidence; for if the testator had expressly mentioned in the will, that his sister Stith was alive, and had given her a legacy, such circumstance could have had no influence, and I should then be equally clear, the plaintiffs could not recover.

In construing a will, the intention of the testator is the material object, and this intention is to be collected in the first place, from what he has declared, by giving to the expressions used their true import, as understood in law. But as words are the only medium by which the intention is to be conveyed, they will never be permitted to stand in the way, when their import would pervert, instead of perform what they were intended for. Therefore, if it should appear from the will of McKinnie Long, that he intended the children of Mrs. Stith to take immediately on the death of George without children, though their mother should be living, such intent must necesarily control the meaning of the word "heirs," and therefore it could not be understood according to its technical meaning. It would then be evident the testator intended heir apparent or issue; but if no such intention can be collected from any part of the will, or

from the fact found, then we can only look for the meaning of the testator from the words he has used, and must take *that* to be his intention which his *words* import.

In the present case, the testator has used the expression "heirs," which is a word of legal import, and means those who shall have succeeded to the real estate of another by inheritance. Now, until it shall be shown that the testator did not understand the term he has employed, either by a reference to the whole will, or from the fact found, he must be *understood* to have *meant* what he has *said.*

From the will, it is not pretended that any such inference is drawn; but it is contended that the fact of his knowing his sister then to be alive, as found, will have that effect.

I can draw no such conclusion. The devise to the heirs of Mrs. Stith, is not of that kind or description, which though the *enjoyment* is deferred, is to *vest* immediately; if it were, the testator's knowledge of her being alive, would then show that he did not understand the meaning of the word he had used, as "*memo est heirs viventis.*" His *intention* then would be manifestly frustrated, by allowing to his words their true meaning.

It has, however, been contended, that whenever the testator takes notice the ancestor is living, a devise to the *heirs* of such ancestor, is to be considered as to his *heirs apparent*; and the cases of *Long* v *Beaumont*, 1 *P. Wms.* 229, and *Den ex demise, Brooking* v *White*, 2 *Black. Rep.* 1010, are cited as authorities.

If those cases proved that there was such a stubborn rule of law, I should certainly hesitate before I would decide otherwise. But they prove no such rule. They only determine, that when it appears from the will that the testator intended the devisees estate should *vest* immediately, though such devisees are called *heirs*, yet the estate shall go according to the *intent* of the testator, and by the word heirs, will be intended *heirs apparent*, if their ancestors be *then living.*

The caae of *Long* v *Beaumont* is shortly this: The tes-

tator devisees to trustees for 21 years, remainder to the first son of his own body, and his heirs male, and in default to the heirs of the testator's body, and in default of such heirs, to his cousin John Spark for 99 years, remainder to his first son in tail male, and in default of such issue, to the *heirs* male of his aunt Elizabeth Long, and in default of such *issue* to his own right heirs. Beaumont, the defendant, was then heir apparent of the testator, and there was a devise of an annuity to him. The testator, in his will, took notice that his aunt, Elizabeth Long, was alive by devising her also a legacy. Now, this case only proves (what has not been doubted, in the examination of the case under consideration) that technical expressions are to bend to the intent of the testator; or in the language of Lord Coke, that the barbarous language of the testator is to be so moulded as to effectuate his intention.

The case cited, is that of a *vested* remainder in tail, to the *heirs* of the aunt of the testator, with remainder in fee to the heir at law, in default of such issue. I have said a *vested remainder*, because the estate was not liable to be defeated by any event, unless the limitation to the heirs of a person then alive made it contingent; and the Court determined that there was sufficient upon the face of the will to discover that the testator did intend those he called "heirs" should take whilst their ancestor was living.

The *estate*, therefore, *vested* at the death of the testator, though the *enjoyment* was postponed.

In deciding that case, the court has determined that the word "heirs" may be *made* to mean children, issue, or heirs apparent, according to the *intent* of the testator, and as, in that case, the testator had *postponed* the heir at law, the then plaintiff, till the *issue* of his aunt was exhausted, the devise to the "heirs" of the aunt must be understood issue; for indeed no one else could take the estate. In aid of that construction, the testator's knowledge that his aunt was then alive, was relied on as a circumstance. The court also laid hold of the words *lawfully begotten*, as connected with the heirs of the aunt, which they said was equivalent to heirs *then living*.

The case from *Blackstone*, was where the testator devised to his wife an annuity for 80 years, charged upon the premises—and after her death, an annuity of 40*s*. per annum to each of his daughters, Elizabeth, Mary and Ann, for the same period, if they, respectively, live so long; and to her daughter Margaret, the defendant, an annuity for 70 years, if she and the testator's son, Richard, should *jointly*, live so long. Subject to the said annuities, he devised the premises to Margaret for two years from and after his decease, with remainder to his son Richard, if then living, for 99 years, if he lived so long; and subject to such 99 years term, he devised the same to his son Richard and his heirs male, and to the *heirs* of Margaret, jointly and equally, and to their heirs and assigns; and for want of heir male of the body of Richard, at his death, he devised the premises charged, &c to the *heirs* and assigns of Margaret, lawfully begotten, to hold to the heirs and assigns of the said Margaret.

Margaret had a son *at the testator's death*. Richard died leaving a son, living Margaret, and the contest was between the heir of Richard, and the childred of Margaret, who claimed to take under the appellation of *heirs* of Margaret.

In that case, *De Grey*, Ch. Justice, said, "the intention of the testator is clear, that the same favor should be extended to the heirs of Margaret as to the heirs male of Richard. He took notice that his daughter was living, by leaving her a term and a subsequent annuity; and he meant *a present interest* should vest in her heir, that is, her heir apparent during her life.

Blackstone thought that the testator's varying the tenure of Margaret's annuity from that of the other sisters, by making hers dependant on the joint lives of herself and Richard, was proof that the testator had calculated Margaret might survive Richard, and therefore, as on Richard's death, the estate was to go to his heirs male and the *heirs* of Margaret, and at a time when the testator calculated Margaret *might be living*, the word "heirs" must be understood *issue*.

These cases need only be stated, to shew their want of

application to the one now under consideration. Was any *present*, vested estate, devised to the heirs of Mrs. Stith which they were to take on the death of the testator, though the enjoyment was deferred? To make the most of their case, it was only an executory devise of the fee simple, after the previous fee to the children of George. During the lifetime of George nothing ever passed to the heirs of Mrs. Stith, nor was it intended by the testator. If George should have children, the estate became vested in them, without a possibility on the part of the plaintiffs. From no part of the will, is it to be collected, that it was the *intention* of the testator, the *heirs* of Mrs Stith should take the estate though she might be *alive*. Nor can we ascertain, like the case in *Pr. Williams*, that upon the death of George, without children, the estate was not to go over until a failure of Mrs. Stith's *issue*. What influence, then, can the facts found have in expounding the intention of the testator? Can it be inferred from any part of the will, that the testator had calculated that Mrs. Stith might be alive, when her heirs were to take? In short, does it appear that the intention of the testator will be frustrated by understanding him to have intended what he has said? It does not. And it is not in the power of human ingenuity to discover, from reading over the will, and the facts found, that the testator did *not* mean the heirs of Mrs. Stith, namely, those who should succeed to her real estate, after her death, were those intended to be benefited by the devise. There is no ground to make such inference from the situation of the parties, as in any event, the devise to the heirs of Mrs. Stith was *never to vest* till George's death, without having issue, and by George having children, to be effectually prevented. The testator, therefore, might have calculated upon George's surviving his sister Stith.

In whatever way, therefore, I am capable of considering this question, it seems to me there is no ground to doubt. Mr. *Powell*, in his excellent treatise on devises, page 567, says, "It is necessary to the constitution of a devise, that

there be a devisee, certain, or capable of being made, &c. and the law, therefore, requires every one claiming in that character to answer in all respects to the description the devisor has given." And, in page 369, upon the same subject, he continues, "Whenever a testator describes his devisee, as heir of one *generally*, none can take under that description unless he fully answers it in all particulars; from whence, it follows, that none can take, as such, during the life of his ancestor, for "*nemo est haves viventis.*" The author then, by way of illustration, puts the case. "One having two sons and two daughters, devised his lands to his youngest son, in tail, and for want of such issue to the *heirs* of the body of his eldest son, and if he died without issue, that the land should remain to his two daughters, in fee. The testator died; the youngest son died without issue, leaving the eldest, who had issue, and it was held by the whole court he could not take." But the same author, after citing diverse other cases decided upon the same principle, remarks: "But if the testator clearly show, by positive words, or if it must be *necessarily* inferred from facts, that he meant one to take by the description of a *particular* heir, who was *not* general heir, that intent shall be carried into execution." Under which description, the cases from *Pr. Williams* and *Blackstone*, are noticed.

Independently, therefore, of the conviction of my own understanding, the opinion I entertain, is supported, as I conceive, by all the adjudged cases and elementary writers I have had an opportunity to examine.

Wherefore, I am of opinion, there should be judgment for the defendant.*

Taylor, C, J. I would willingly avail myself of any expressions in the will, manifesting the testator's intent to use the word "heirs" in a different sense from that affixed to it by the law. So far the authorities allow us to go; but in all the cases cited for the plaintiff, and none more in point

*Judges Hall and Henderson gave no opinion in this case.

can be found, such intent was collected from the will itself. Parol evidence has never been resorted to; it was offered in the case in Leonard, 70, but rejected by the Court.

Judgment for the defendant.

NOTE.—On the first point, see *Chessun* v *Smith*, 2 Car. Law. Repos. 392. *Stowe* v *Ward*, 3 Hawks. 604. S. C. 1 Dev. Rep. 67. *Jourdan* v *Green*, Ibid, 270. *Ward* v *Stowe*, 2 Dev. Eq. Rep. 509. *Bullock* v *Bullock*, Ibid, 307. *Simms* v *Garrot*, 1 Dev. & Bat. Eq. Rep. 303. On the second point, see *Blacknall* v *Wyche*, 1 Iredell's Rep. 94.

THOMPSON *vs.* JOHNSTON—Page 491.

Two *sci. fas.* issued to the county where the witness resided when he was summoned, on which "not found" is seturned, are sufficient to authorise the entry of a judgment against him.

The defendant was summoned by the sheriff of Rockingham, where he then resided, to attend Guilford Superior Court, as a witness for the plaintiff in his suit against Lewis Whitimore; he failed to attend and was called out and fined *nisi*. A *sci. fa.* issued to Rockingham, which was returned not found: A second *sci. fa.* issued to the same county, on which there is the same return.

On motion for Judgment according to *sci. fa.*

SEAWELL, J. delivered the opinion of the court.

We are all of opinion, that the plaintiff is entitled to have judgment. When a witness is summoned he is bound to attend, and the law makes it his duty to know this obligation. The witness by removing to another county, could in no wise alter the situation he stood in. As to the *sci. fa.* we think they were properly awarded—they are to a county where the witness resided at the time he was summoned—and it does not appear the plaintiff knew the witness had removed, nor are we now prepared to say how that would have varied the case.

GARDNER *vs.* NEIL—Page 492.

An action of trespass is the proper remedy against one who enters the plaintiff's house, under a warrant, to search for a runaway slave.

This was an action of trespass *vi et armis*, for entering and searching the plaintiff's house, under the pretence of looking for a runaway slave. The defendant justified, under a warrant, and it appeared in evidence, that the slave was not found in the plaintiff's house. The warrant was set forth in the record, and it's legality submitted to the consideration of the court; but the only question decided was as to the form of action.

CAMERON, J. delivered the opinion of the Court.

Every entry by one, into the dwelling-house of another, against the will of the occupant, is a trespass, unless warranted by such authority in law as will justify the entry. And the action of trespass is the only proper form of action which the party complaining can legally maintain in such case.

Whether the warrant under and by virtue of which the defendants justify their entry, into the dwelling-house of the plaintiff, will amount to a complete justification, or not, depends on facts not now before the court.

As the court is of opinion that the form of the action is proper, it is unnecessary to decide the second question stated in the case sent up.

Rule made absolute, and new trial granted.

STATE *vs.* VINCENT—Page 493.

It is not essential to the validity of an indictment that it should be signed by the prosecuting officer.

The defendant was convicted of perjury, and his counsel moved in arrest of judgment, because the indictment was signed by William Miller for H. G. Burton, Attorney Gen.

Taylor, C. J. An indictment is an accusation found by an inquest of twelve or more lawful jurors upon their oaths. The law has prescribed certain forms, in which such accusations shall be drawn, and will not allow any citizen to be punished unless such precision is observed. That they should be sanctioned by the finding of a grand Jury, and signed by their foreman, as the best evidence of being so found, is essential to their validity; but neither the Common Law, nor any Statute that we know of, requires them to be signed by the Attorney General. An indictment legally framed, in other respects, would not be bad by not being signed by the prosecuting officer.

Note.—It seems that the grand jury's returning a bill into court, and their publicly rendering their verdict on it, in the form "a true bill," and its being recorded or filed amongst the records of the court, makes it effectual; and the want of the foreman's name to it will not invalidate it. *State* v *Calhoon*, 1 Dev. & Bat. Rep. 374.

FORT *vs.* FORT'S EX'RS—Page 493.

A testator bequeathsd to himself a child's part, to his son A. several negroes; and all the rest of his estate to his heirs except his son A. "because he has received his part of my estate of every denomination." If the testator afterwards die intestate as to the part reserved, A. may come in for a distributive share of that part; for the words of exclusion relate only to the property contained in the residuary clause.

Elias Fort, by his last will, devised as follows:

1st—I make myself an heir to my estate, and for me to have a child's part forever.

He then bequeaths several negroes to his son, Ricks Fort, and in a subsequent clause gives all the rest of his estate to his heirs, except Ricks Fort, "because he has received his part of my estate of every denomination."

This was a bill in Equity, instituted by Ricks Fort, to recover a distributive share of the child's part, reserved by the testator. To this bill there was a demurrer for want of equity.

This case was argued by *Baker* for the complainant, and *Browne* for the defendant.

Cameron, J. delivered the opinion of the court.

The testator by his last will devised as follows, to wit: "First, I make myself an heir to my estate, and for me to have a child's part of my estate forever." "I give to my living son, Ricks Fort, big Luke, &c.—likewise, I give and bequeath to my heirs all the rest of my estate, Ricks Fort excepted, because he has received his part of my estate of every denomination." The testator died without making any disposition of that part of his estate reserved to himself. The complainant claims a distributive share of it, which is resisted by the defendants, under the words of exclusion above mentioned.

The testator, by reserving to himself a child's part of his own estate, plainly shewed, that as *to so much* of his estate, he did not intend, at the time of making his will, to dispose of it. He evidently intended to retain the power of appropriating it according to his future inclination; but not having done so, he must be considered as having died intestate in relation to it.

The words of exclusion relied on, in that clause of the will containing the bequest to the complainant, must be considered with reference to the fair meaning of the testator. At the time of making his will, he did not intend to dispose of, nor did he in fact dispose of, the *whole* of his estate. As to what he was then giving away by his will among his children, he meant that he had given his son Ricks his full

share; and that he [Ricks] should not take any more of the estate which the testator was devising to his heirs. The words of exclusion can only operate to deprive Ricks Fort of a participation of the property contained in the residuary clause of the will; but for which he would be entitled to an equal share of that property which the testator clearly meant to dispose of—they cannot apply to that part of the estate which the testator, by reserving to himself, did not dispose of, and of which he died intestate;—consequently, the complainant is entitled to a distributive share of that part of the testator's estate.

Demurrer overruled.

NOTE.—See *Ford* v *Whedbee*, 1 Dev. & Bat. Rep. 16.

PHILEMON HAWKINS *vs.* JOHN HAWKINS'S EX'R.—Page 495.

Parol evidence is inadmissible for the purpose of proving an agreement inconsistent with, and repugnant to, a bond of submission to arbitration executed by the parties.

The rule of law which disallows the introduction of parol evidence, for the purpose of contradicting, altering, or varying a deed, applies only to the *parties* to the instrument.

Upon the trial of this suit in the Court of Equity, in Warren county, several issues were submitted to the jury; but it is only necessary to state those on which the questions arose which were submitted to this court. These were,

1st—Whether negro Lewis ever came to the hands of the defendant, as part of his testator's estate?

2nd—Whether the title to the negroes in dispute, was in complainant's testator; or in defendant's testator?

Upon the trial of the first issue, the defendant introduced several witnesses, who proved, that on a proposition being made by Philemon, to refer the will of Philemon Hawkins to certain arbitrators, John Hawkins declared he would not

refer his title to Dorcas and her issue, for he had a good title thereto; that thereupon Philemon did agree that his title to Dorcas and her issue should not be impaired thereby; or, in the words of the witness, should be taken out. That a day or two afterwards, the parties met and executed a bond of submission, under which the arbitrators afterwards made an award. The counsel for the petitioners, insisted at the trial, that the bond being under seal, was the only evidence of the terms of submission, and that parol evidence of the previous agreement was inadmissible.

On the trial of the second issue, the complainant offered several depositions to prove declarations of the defendant's testator, that the purchase of the negroes was made for the complainant's testator.

The defendant's testator claimed title to the said negroes under a bill of sale, transferring the property absolutely to him; to which bill of sale, from Abrams and Bishop, the complainant's testator was a subscribing witness.

The case was argued by *Browne* for the complainant, and *Baker* for the defendant.

Cameron, J. delivered the opinion of the court.

The evidence offered by the defendants, to prove a parol agreement inconsistent with, and repugnant to, the bond of submission executed *by the parties*, was *properly* rejected, because forbidden by policy and the plain rules of law; which prohibits the *parties* to a deed, from contradicting it by parol evidence, unless in cases of fraud and accident.

The evidence offered by the plaintiffs, to prove the declarations of the defendant's testator, that the negroes in question were purchased by him for plaintiff's testator, notwithstanding the bill of sale was made absolutely to defendant's testator by the seller, was *improperly* rejected.

The rule of law which disallows the introduction of parol evidence, for the purpose of contradicting, altering, or varying a deed, applies only to *the parties* to the instrument. This is settled in the case of *Shepperd* v *Glasgow*, decided in this court. As then, the testator of the plaintiffs *was not a party* to the bill of sale, by which the negroes were trans-

ferred to defendant's testator, the former is not precluded from availing himself of the testimony proposed.

Let there be a new trial on this issue.

NOTE.—On the first point, see *Commissioners of Greene* v *Holliday*, 2 Hay. Rep. 284. *Clark* v *McMillan*, 2 Car. Law Repos. 265. *Donaldson* v *Benton*, 4 Dev. & Bat. Rep. 435.

Upon the second point, see *Strong* v *Glassgow*, 2 Murph. Rep. 289.

DICKINSON *vs.* VAN NOORDEN—Page 497.

An endorsement in full on a negotiable instrument may be struck out on the trial.

This was an action on a bill of exchange, drawn by the defendant, and made payable to the plaintiff, who endorsed it to William Guthrie, or order. Two questions were submitted to this court—

1—Whether the bill is negotiable by indorsement, not being payable to order?

2.—If it is, can the indorsement in full be struck out at the trial, and the action be supported in the name of the payee?

The latter question only, was decided by the court, whose opinion was delivered by

CAMERON, J.

It has been already decided by this court, in the case of *Margaret Gittings* v *Ward*, that a full endorsement of a negotiable instrument may be stricken out on the trial. The correctness of this opinion is supported by the opinion of the Chief Justice of the United States, and the practice in the court in which he presides. If the instrument be not negotiable, there surely can be no objection to striking out such indorsement.

Judgment for plaintiff.

NOTE.—See acc. *Dook* v *Caswell*, 1 Hay. Rep. 18, and the cases referred to in the note.

LEROY *vs.* DICKERSON AND OTHERS—Page 497.

If an injunction be sustained on bill and answer, and the complainant regularly takes depositions, they may be read on another motion to dissolve, made by defendant in consequence of the introduction of an amended answer, which he is permitted to file: but *ex parte* affidavits are not admissible.

This was an appeal from a decree of the Court of Equity of Beaufort county. The answers of all the defendants, except that of Joel Dickinson, had been filed at the Fall Term, 1813, and the cause stood on replication and commissions. Leave was given to amend the answer of Marshal Dickinson, and the amended answer was made the foundation of a motion to dissolve the injunction. To repel this answer, the complainant moved for leave to read depositions filed in the office, which was refused by the court; and, on hearing the answer, an order was made to dissolve the injunction for two thousand dollars. The only question decided by this courrt was, whether the complainant ought to have been permitted to read the depositions.

The case was argued by *Browne* for the complainants, and *Mordecai* for the defendant.

Cameron, J. delivered the opinion of the court.

Although the usual practice in the Courts of Equity of this State, has been to exclude affidavits taken *ex parte* to support the merits of an injunction, we know of no adjudication which would exclude the reading of depositions taken regularly on notice given to the adverse party, after the injunction has been sustained, and the cause continued as an original, on a motion to dissolve the injunction by the introduction of the amended answer of the defendant. The distinction between the cases is so obvious, that it need only be remarked, that the reason for excluding them in the former case, does not apply to the latter. In the former, they are taken without notice, and *ex parte*. In the latter, they are taken on due notice, affording the adverse party an opportunity of a cross-examination.

We are of opinion, that the complainant was entitled to support the merits of his bill, by the depositions, regularly taken in the cause, on the motion of defendant to dissolve the Injunction on his amended answer.

Therefore, let the decree of dissolution be reversed, and the cause remanded, with leave to complainant to support his injunction by the depositions regularly taken between the parties.

NOTE.—Upon the subject of dissolving injunctions, see *Christmass* v *Campbell*, 1 Hay. Rep. 123. *Thompson* v *Allen*, 2 Hay. Rep. 150. *Smith* v *Thomas*, 2 Dev, & Bat. Eq. Rep. 126. *Moore* v *Reed*, 1 Iredell's Eq. Rep. 418.

DAVIS & ANOTHER *vs.* EVANS & ANOTHER—Page 499.

The defendant demurred specially to the declaration for eight distinct causes; which demurrer was, upon argument, sustained; but the court, at the same time, (Spring Term, 1812,) gave the plaintiffs leave to amend, upon payment of costs.

At a subsequent Term, the defendant obtained a rule upon the plaintiffs, to shew cause, why so much of the former order as gives leave to amend, should not be set aside for irregularity, error, and want of authority to grant such leave; on the argument of which, the court intimated an opinion that the order was irregular, but referred it to this court to decide whether the rule should be made absolute.

The question was elaborately argued at a former Term, by *Strong* for the plaintiffs, and *F. Williams* for the defendants; when the court took time to advise—and now, at this Term, their opinion was delivered by

SEAWELL, J.

This question is in effect, whether the court below had power to allow the amendment: for if the court had no authority, the granting the order was a perfect nullity.

If a strict and literal construction be placed upon the act of 1790, it will be found, that in no case whatever can *matter of form* be amended, whereby any end is obtained: for by the words of the act, this power seems only to be exercisable as to imperfections, which are not set down as causes of demurrer. And by the preceding part of the same act, such defects are cured by not being demurred to.

The last part of the section, however, has these general words, "That the said courts may, *at any time*, permit either of the parties to amend *any thing* in the pleading and process, upon such conditions as the said courts respectively, shall, in their discretion and by their rule, prescribe."

Unless, therefore, the courts under these last words, have power to permit the parties to amend in cases of Special Demurrer, the consequence would be, that the plaintiff may be permitted to amend, *in substance*, though there be a general demurrer. And yet, as to a mere slip in matter of *form*, not essential to the justice of the case, which had been seized upon by vigilant counsel, the hands of the court were completely tied.

As therefore, this construction can be completely obviated by allowing to the latter words an import, which they certainly bear, that of amending *any thing* at *any time*, we are of opinion it was competent for the court below to make such order, and that the rule for setting aside the order be discharged.

NOTE.—See S. C. reported in 2 Murph. Rep. 202.

DOUGLAS *vs.* AULD—Page 500.

The return on a *fi. fa.* of "not satisfied" is not a due return under the act of 1777, (1 Rev. Stat. ch. 109, sec. 18,) and the sheriff making such return is consequently liable to an amercement of one hundred dollars.

Scire facias against the defendant, a sheriff, to shew cause

why an amercement against him should not be made absolute. The plaintiff had issued a *fieri facias* against *Cash*, which came to the hands of the defendant, who returned on it "Not satisfied;" and the only question submitted to this court was, whether for such return he was liable to amercement under the act of 1777?

Cameron, J. delivered the opinion of the court.

By the act of Assembly passed in the 2d session of 1777, C. 8, § 5, the several sheriffs are required to execute all process directed to them, and to make "*due* return" thereof to the courts from whence such process issued, under the penalty of £50 for each failure.

The true meaning of the words "due return," we understand to be, that the sheriff shall, by his return, set forth *what* act he hath done in compliance with the process directed to him—that is, in the case of an execution against goods, &c. that he shall return that the same is satisfied, or that he has levied on the estate of the defendant, and could not sell for the want of purchasers; or that there are no goods, &c. belonging to the defendant within his bailiwick.

The simply returning the execution on the return day named on it, without having made a legal effort to obtain satisfaction, is not a "due return" within the true meaning of the act of Assembly. The return, in this case, "not satisfied," is substantially the same as if there was no return whatever on the execution—it is perfectly evasive of the law, and if permitted to pass unnoticed and unpunished, would do a serious injury to the creditor, and bring the authority of the law into contempt—for if such return should form a sufficient excuse for a sheriff *once*, there is no reason why he might not repeat it as often as he pleased.

Amercement made absolute—Judgment for the plaintiff.

Note.—But if the sheriff returns an execution in due time, endorsed "satisfied," but does not return the money with it, nor pay it to the plaintiff or his attorney, he cannot be fined under this act. *Davis* v *Lancaster* 1 Murph. Rep. 255.

CURTIS *vs.* HARTSFIELD AND DELK—Page 501

Where an administrator sells at vendue a slave, as the property of his intestate, and recovers judgment on the bond given for the purchase money, and the son of the intestate, claiming the slave by gift from his father, threatens to sue him for it; equity will prevent the suit by injuction, as the parties are now all before the court and full justice can be done them; and it will also prevent the administrator from taking out execution, until the title is ascertained or the purchaser indemnified.

This was a motion to dissolve an injunction obtained by complainant, on a bill containing the following allegations.

That in September, 1813, Nathan Hartsfield, surviving administrator of David Delk, sold at public vendue, on a credit of six months, a Slave named Ben, as the property of his intestate, of which the complainant became the purchaser at the price of $425, for which he gave his bond. That since the sale, Jacob Delk, son of the intestate, has claimed Ben as his property, under a deed of gift from his father, and threatens to sue for him; in consequence of which the complainant, before his bond became due, applied to the administrator for an indemnification against Jacob's claim, and offered to pay off his bond, upon being made secure against it; but the administrator refused to give it, and hath since recovered judgment on the bond. That the complainant can get no satisfaction out of the estate of David Delk, which is insolvent; nor from the administrator, who hath sold off all his property and is about to remove: he, therefore, prays an injunction, and that the administrator and Jacob Delk may be compelled to litigate their title to Ben before he is compelled to pay the price of him.

Jacob Delk's answer sets up a title to Ben, under a dead from the intestate, made in 1811, and registered at the time of sale; alleges infancy at tne time of the vendue, and special notice to the complainant of his title, and aa assurance that he should sue for him: it also asserts that he forbid

the sale, and doubts whether the court can compel him to sue the administrator, against whom he has no claim.

The answer of Nathan Hartsfield, the administrator, also alleges special notice to the complainant of Jacob's claim, his forbidding the sale, and insists that the complainant having purchased with a full knowledge of the defect in the title, has no equity to be relieved; it does not admit the insolvency of his intestate's estate, nor his own design to remove.

SEAWELL, J. delivered the opinion of the court.

It is the opinion of this court, that the injunction be continued.

In forming this opinion, we do not undertake to determine that it is in the power of this court to compel the defendant to litigate the title of the slave; but when the complainant is called upon to pay the purchase money by the defendant Hartsfield, it is certainly competent for a court of Equity, to compel him to indemnify the complainant. We also are of opinion, that the defendant Delk should be restrained from suing the complainant, inasmuch as a fair opportunity is now presented to both parties, to litigate the title of the slave—and the court of Equity, having all parties before it, would be competent completely to do justice, by making such decree as would embrace the whole case.

THE STATE *vs.* BRYSON—Page 503.

It is not necessary under the act of 1791 (1 Rev ch. 338, sec. 3) in an indictment for perjury to state that the person holding the court where the false was taken, is a Judge of the Superior Courts of law; the latter part of the third section of the said act expressly dispensing with the necessity for such statement.

CAMERON, J. delivered the opinion of the court.

The objection taken to the authority of the court to a-

ward judgment fixed by Statute, on the conviction of the defendant, is founded on the circumstance, that it is not stated in the indictment that the Hon. Leonard Henderson, before whom the oath constituting the perjury, was taken, is a Judge of the Superior Courts of Law of this State.

Whatever weight this objection might be entitled to, had the indictment conluded at Common Law, it is unnecessary to consider or decide. The indictment states, that the false oath was taken in the Superior Court of Law, held for the County of Mecklenburg, before the Hon. Leonard Henderson, and avers that the said Leonard Henderson had competent power and authority to administer an oath to the defendant, and concludes against the Statute. The act of 1791, C. 7, § 3, declares, "that in every presentment or indictment, to be prosecuted against any person, for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence, charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, (averring such court, or person or persons, to have a competent authority to administer the same) together with the proper averment, or averments, to falsify the matter or matters, wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed.

The objection relied on, is, in the opinion of the court, completely obviated by the force and effect of the latter member of the said recited section.

Motion in arrest of judgment overruled. Judgment for the State.

Note.—See *State* v. *Ammons*, 3 Murph. Rep. 123.

BENZIEN AND OTHERS *vs.* LENOIR AND OTHERS—Page 504.

When an attorney in fact conveys land, but his power is so defective as not to enable him to convey the legal title, an acquiescence by the owner and his heirs amounts to a confirmation of the contract; and gives an equitable title to the purchaser.

A person being an alien is a good reason for not making him a party.

Where suits are brought in a court of equity over the subject matter of which courts of common law, as well as the court of equity, have jurisdiction, the court of equity will consider itself as much bound by the statute of limitations, as a court of law; but where it has exclusive jurisdiction, as in all cases of trusts, the statute does not stand in the way.

If a person enters land, knowing it to have been previously appropriated, he becomes a trustee for all equitable claimants under such appropriation.

HALL, J. delivered the opinion of the court.

It seems that the lands in question were originally granted to Henry Cossart, from whom they descended to Christian Frederick Cossart, his son and heir at law. That he, in the year 1792, made a power of attorney to Frederick W. Marshall, either to sell the lands himself, or to appoint some other person attorney in fact for that purpose. That the said Marshall did not dispose of the lands, but nominated and appointed John Michael Graffe attorney of the said Cossart in the year 1774, with very general powers, as he was authorised to do. That the said Graffe, in the year 1778, sold the said lands as the agent of the said Cossart, to Hugh montgomery (the elder) for £2500, of which he received £1000; and afterwards, in the same year, Hugh Montgomery mortgaged the said lands for 500 years to said Graffe, to secure the balance of the debt to him, as agent of the *unitas fratrum*. He died, and Traugott Bagge became his administrator, and in the year 1784, assigned the said term so mortgaged to Frederick W. Marshall, agent and trustee for the *unitas fratrum*. He died, but by will, devised the lands to Christian Lewis Benzien, in trust for the *unitas fratrum*, whom, with others in Pennsylvania, he appointed his executors. The said Benzien died in the year——, and

the mortgage term is at this time in his representatives, who are made parties to this suit; and who are entitled, (if any person is) to receive the money due upon the mortgage from Hugh Montgomery or representatives. Hugh Montgomery, in the year 1779, by deed, conveyed the lands to John Brown and others, trustees for two infant children, who are also parties to this suit, and by his will, directed the money due to the Moravians to be paid; taking it for granted, no doubt, that Cossart had held the lands in trust for them.

The defendants claim the lands by virtue of grants which issued from the State in the year——, either to themselves or those under whom they claim, and, a possession of said lands ever since; and it is taken for granted, without notice of any trust, for the Moravians.

Upon this statement of facts, the following questions have been submitted to this court.

1*st.* Do the deeds from Lord Granville to Henry Cossart, express a trust for the *unitas fratrum*?

2*nd.* Can parol evidence be admitted in this case to prove a trust?

3*rd.* If parol evidence be admitted, does it prove a trust?

4*th.* If a trust be shewn, is it valid and such a trust as supports the allegation of the bill of complainants?

5*th.* Has the interest of Henry Cossart in the lands comprehended within the aforesaid deeds of Lord Granville, been transferred to Hugh Montgomery?

6*th.* If the interest of Henry Cossart has been transferred, is there not a plain remedy at law?

7*th.* Are the proper parties before the court?

8*th.* Are the defendants protected by the Statute of Limitations?

With respect to the 1st, 2d, 3d and 4th questions, we think it unnecessary to give any opinion, because we think it is not competent for the defendants to make that objection. It concerns them not, whether there is a trust for the Moravians or not. Suppose there is not, does it follow that Montgomery, who purchased the lands, or those claiming under

him, are to lose the benefit of that purchase, merely because when he executed the mortgage deed to Graffe, he considered the balance of the purchase-money due by him, a debt due the Moravians, when that was not the fact? He, in all probability, became possessed of that opinion from the representations of Graffe, the agent of Cossart. If Graffe made such representations, it was natural for Montgomery to believe him. But whether such idea was held out, or not, or whether true and correct, or not, is not to interfere with the *bona fide* purchase made by Montgomery. The purchase money was to be paid to Graffe, or those representing him; and Montgomery, or those representing him, have but little reason to be concerned, whether the person entitled to receive it, receives it as the agent of Cossart, or as the agent of the *unitas fratrum*. They have it to pay, and are willing to pay it. But after payment they are not bound to see to its aplication. It therefore, seems difficult to dscern, how the rights of the defendants are to be affected by the solution of the question, whether the lands were held in trust for the *unitas fratrum* or not. As to them, the inquiry is useless, whether the person entitled to receive it pays it it over to the Moravians, or holds on upon it, as the agent of Cossart's heirs, they, the defendants, have as little to do with it, as one man can possibly have to do with another man's business.

If Graffe, and other agents of Cossart, have uniformly admitted the trust, and Cossart and his heirs have so long acquiesced; that circumstance, connected with the testimony in the case, to prove a trust, may direct the discretion of the person entitled to receive the money, and probably might be deemed sufficient to establish a trust in case of a contest between such person and the *unitas fratrum*. But on that point, as before observed, no opinion is now given.

The fifth objection raised by the defendants is, that the complainants have a plain remedy at law. If that is the case, certainly the bill ought to be dismissed. But to this objection two answers may be given.

The first is, that the power of attorney from Marshall to

Graffe, is so defective, as not to enable him to convey the legal title of the lands to Montgomery. However, the lands were purchased by him, and the mortgage deed was executed to Graffe to secure the balance of the purchase money. In this situation things remained from the year 1778 until the present time. No objection to the sale has ever been made by Cossart or his heirs, or any person interested under him until now, and such silence must be taken as a confirmation of the contract. If so, Montgomery, having only an equitable interest in the lands, is right in coming into this court, as such equitable interest would not be noticed by a court of Law.

The next answer to that objection is, admitting that the legal title passed from Graffe to Montgomery, that it has been shewn that an action at law was brought in Morganton Superior Court in the year 1784, by the complainants, in which they were nonsuited in the year 1789. And, indeed, we have abundant reason to believe that such was the temper of those times, that Cossart himself, being an alien, or any person claiming under him by deed executed since the commencement of the late war; could not have effected a recovery. Montgomery, however, who conveyed whatever title he had to the land, to Graffe, by way of mortgage, and now wishes to redeem that mortgage, ought not to be injured on that account. He, or those claiming under him wish to possess the lands agreeable to his contract with Graffe, and the legal title is not in them. They have a right to call upon the representatives of Graffe for a reconveyance of the mortgage term, and upon the defendants to deliver up possession, and account for the profit &c. For these reasons, we think this court has jurisdiction, and ought to sustain the bill.

The next objection, namely, that there are not proper parties before the court, has been in a great meaeure obviated; because, since that objection has been made, new parties have been permitted to be made. It probably would have been more regular, if the Attorney-General and the Trustees of the University, had been made a party. Indeed, that

would have been indispensable, if we entertained a doubt on the question, whether the lands had been confiscated. Cossart also, no doubt, should have been a party, if within the country—but he is an alien, and, therefore, cannot be made a party.

The next and last objection is, that the defendants are protected by the statute of limitations. When suits are brought in this court, over the subject matter of which, Courts of Common Law, as well as this Court, have jurisdiction, this Court will consider itself as much bound by the Statute of Limitations, as a Court of Law ; but in cases where it has exclusive jurisdiction, as in all cases of trusts, the statute does not stand in the way. Authorities need not be cited to prove this. In the case before us, the defendants are charged with having acquired a title from the State, knowing of an equitable title at the same time in the complainants, and that, therefore, they became trustees for them. If that was the fact, the statute shall not afford them protection. If they had not notice, and became possessed of the legal title, they stand in no need of the protection of the statute ; because it is a rule, by which this court professes to be governed, not to deprive an innocent purchaser for valuable consideration, of the legal title, in favor of a complainant, whose claim is an honest, but only an equitable one.

But how does the present case stand? Admitting that the defendants had no notice of any trust for the Moravians, yet they do not state, that they were ignorant that the lands had been appropriated. They do not deny, but that they had a knowledge that a grant had issued to Cossart. But, they say, admitting Cossart to have had a title, they deny that he held in trust for the Moravians. But, if they knew that the lands had been appropriated, they knew that they were not the subject of entry, and, therefore, became trustees for all equitable claimants under such appropriation. For these reasons, we think the statute does not apply.

It is true, however, that in cases of this sort, where the complainants have suffered their claims to lie dormant an

unreasonable length of time, this Court will lay hold of that circumstance to prevent a decree in their favor. It is apprehended, however, that that circumstance does not exist in the present case. The sale to Montgomery took place in the year 1778. Immediately after the war, a suit was brought in Morganton Superior Court, in which there was a nonsuit in 1789; and in the year 1793, the present action was brought.

Decree for the complainants.

NOTE.—Upon the second point, see *Ingram* v *Lanier*, 1 Hay. Rep. 221. *Vann* v *Hargett*, 2 Dev. & Bat. Eq. Rep. 31. *Spivey* v *Jenkins*, 1 Iredell's Eq. Rep. 126.

On the question of the statute of limitations, see *Hamilton* v *Shepperd*, 3 Murph. Rep. 115. *Bell* v *Beeman*, Ibid, 273. *Thompson* v *Blair*, Ibid, 583. *Jones* v *Person*, 2 Hawks. 269. *Falls* v *Torrance*, 4 Hawks, 412. *Edwards* v *University*, 1 Dev. & Bat. Eq. Rep. 325.

STATE *vs.* FORT—Page 510.

Upon an indictment for a maim, if no issue be joined between the State and the defendant judgment must be arrested.

Upon an indictment for maiming, the defendant was found guilty, and on a motion to arrest the judgment, one reason was, that no issue was joined between the State and the defendant.

CAMERON, J. delivered the opinion of the court.

Among the several objections taken to the authority of the court, to award judgment, on the verdict against the defendant, it is alleged that no issue was joined between the State and the defendant.

On examining the record, it is ascertained that the objection is true, in point of fact—the legal consequence is, that there was nothing submitted to the jury, and that their verdict is nugatory.

Let there be a *venire facias de novo.*

NOTE.—In capital cases, there is no need of a formal joining of issue, preparatory to trial; the prisoner's plea, and the joining of issue, called the *similiter* being *ore tenus*. *State* v *Lamon*, 3 Hawks, 175. *State* v *Christmas* 4 Dev. & Bat. Rep. 410.

WEBB *vs.* JONE'S EX'RS—Page 510.

Where one signed his name to a blank administration bond, under a well founded belief that another was to become security with him, but who failed to become so, equity will not grant relief against him who signed.

This was a bill in equity for the purpose of charging the defendant's testator as security to an administration bond, which was signed by him in blank, and not afterwards filled up.

HALL, J. delivered the opinion of the court.

It is admitted that there is no remedy, at law, upon the bond signed by the defendant, under the circumstance as set forth by the complainant himself; and how far this court ought to go (were it confined to the facts alone contained in complainant's bill) in subjecting the defendant to the demand of the complainant, we are relieved from the consideration of, because the defendant's answer is made a part of the case, and the parts therein set forth are to be taken as true.

He states, that Col. Branch and himself were offered to the court as securities of Mrs. Webb, and by them approved of—that he agreed to sign, and did sign, a blank bond, but that it was not filled up, or witnessed, or in any respect binding upon him, until signed by Colonel Branch. This, it seems, was never done. There appears to be no fraud in the defendant—his conduct was fair and open. There seems to have been no mistake or misunderstanding, of what was done or intended to be done. No person could be misled, or

had a right to believe, under such circumstances, that the defendant was, or intended to stand as the sole security of Mrs. Webb. If an error has been committed, it was by the Clerk in granting letters of administration before bond and security was given.

For these reasons, we are all of opinion, that the defendant is not liable in equity, and that the bill should be dismissed.

NOTE.—See *Huson* v *Pitman*, 2 Hay Rep. 331. *Armstead* v *Bozman*, 1 Iredell's Eq. Rep. 117.

STANLY *vs.* SMITH AND GREEN—Page 511.

The purchaser of land sold for taxes is not bound to show that the sheriff advertised the land agreeably to law.

No deed, in itself invalid and inoperative, as for the want of a consideration either good or valuable, is rendered valid by registration; registration being only required for the purpose of perpetuating titles to land.

The questions submitted to the Court, in this case, were,

1st. Whether a sale of lands (not listed) for taxes, after an advertisement in the papers, of more than thirty, but less than sixty days, be valid, so that the sheriff's deed passes a title to the purchaser?

2nd. Whether, on a sale for taxes of land not listed, it is not incumbent on the purchaser to give evidence that such sale had been advertised at the Court-House, and other public places, in the Courts, as the law directs?

3rd. Whether a deed proved and registered agreeably to the act of 1715, does convey land, when it does not appear to have been made, either on a good or valuable consideration?

HALL, J. delivered the opinion of the court.

One of the questions, which arise in this case, was decided in *Martin* v *Lucy*, in this court, namely—Whether a

purchaser of land, sold for taxes, is bound to shew that the sheriff advertised it agreeably to the directions of the Act of Assembly? It is true, in that case, the lands had been listed, and it was only necessary to advertise them in the county in which they were situated, and in this case they have not been listed, in which case the additional duty is imposed upon the sheriff of advertising them in the State Gazette.

But, in principle, we consider them precisely the same. In both cases, it is made the duty of the sheriff to advertise. but few persons would become purchasers if it was incumbent upon them to prove that the sheriff had done his duty in that respect. We think it better to say, that as the law has made it his duty to do so, persons wo bid for the land may take it for granted that he has discharged that duty—otherwise they would be deterred from bidding, and the mischief to owners of land, so sold, would be greater, we apprehend, than would be experienced by not imposing the burthen of proof upon purchasers.

We mean not, by this decision, to interfere with any remedy which the owners of lands, so situated, may have, against a sheriff who may sell them without having previously advertised, as the law directs.

As to the second question, namely—Whether a deed made upon neither a good, or valuable consideration, but proved and registered agreeably to the directions of the act of 1715, does convey the land therein described? We are of opinion that the act was passed merely for the purpose of perpetuating titles to lands, and that no deed in itself invalid, and inoperative, is rendered so, by the circumstance of its being registered.

Let there be judgment for the plaintiff.

Note.—Upon the first point, see acc. *Martin* v *Lucey* 1 Marph. Rep. 311. See also *Avery* v *Rose*, 4 Dev. Rep. 549. *Love* v *Gates*, 4 Dev. & Bat. Rep. 363. *Pentland* v *Stewart*, Ibid, 386.

WOOD *vs.* HOOD—Page 513.

An appeal would not lie from the decision of the county court, in the case of a petition for a private way before the act of 1813 (1 Rev. Stat. ch. 104, sec. 3.

It is referred to the Supreme Court, to decide, whether there can be an appeal from the decision of the County Court, in a case of petition for a private way.

CAMERON, J. delivered the opinion of the Court.

On a careful examination of the acts of Assembly, respecting the power of the County Courts, to order the laying out of roads, &c. we cannot discover any distinction between the case under consideration, and the case of *Hawkins* from the County of Randolph, in which it was determined that an appeal would not lie from the judgment of the County Court to the Superior Court, in the matter of roads, &c.

The right of appeal, in such cases, is given by an act of the General Assembly, passed at their last Session, which operates on all future cases.

This appeal having been brought up before the passing of said act, and at a time when there was no legal authority for the same, the Superior Court had no jurisdiction of it.

Appeal dismissed.

NOTE.—The case of *Hawkins* v *County of Randulph* 1 Murph. Rep. 118, decided that an appeal would not lie to the Superior Court, from an order of the county court, concerning a public road. The act of 1813 (1 Rev. Stat. ch. 104, sec. 3) expressly gives an appeal in such cases. But it was decided in *Ladd* v *Hairston* 1 Dev. Rep. 368, that that act did not apply to cases of petition for a private way, but an appeal was allowable in such cases by the general appeal law of 1777 (1 Rev. Stat. ch. 4, sec. 1) as being a contest between two individuals. No appeal is given in a proceeding under the act of 1834 (1 Rev. Stat. ch 104. sec. 7) to turn a road on one's own land. *Gatling* v *Liverman*, 1 Iredell's Rep. 63.

SMITH *vs.* WALKER—Page 514.

The declarations of a person, now deceased, respecting a corner made when he was the owner of the land, are not evidence in favour of one claiming under such owner.

The plaintiff claimed title under a patent granted to Walker, and in order to prove a corner tree, introduced evidence on the trial of this ejectment, of the declarations of John Walker the younger, now dead, as to what he heard his father, the patentee, say respecting the corner. The assertions of Walker, the patentee, were made when he was owner of the land, and at a time when no dispute existed, or was expected, concerning the title. The evidence was received in the Superior Court, and the plaintiff obtained a verdict. The cause came up on a motion for a new trial.

HALL, J. delivered the opinion of the court.

We do not mean, in the smallest degree, to alter the rule of law, which, when questions of boundary are before the court, permits evidence to be given of common rumor and report, or what deceased disinterested persons have been heard to say, &c. Necessity, in that case, as well as in many others, requires that such evidence should be received: nor would it be proper to say, that evidence should not be given of any act done by the owner of the land—but, to permit his declarations to be given in evidence, would be impugning the maxim of law, which declares, "that no person shall be a witness in his own cause.

If the person, whose declarations are now sought to be given in evidence, was alive, and had been present in court, having the same interest in the lands as when those declarations were made, no person would have thought of using him as a witness. And would it be proper to take the declarations of a person, as evidence, whose testimony, as a witness to the same point would be properly rejected? Although for want of better testimony, declarations of de-

ceased persons are to be received as evidence, the law never intended to qualify persons to make them, whose testimony on the score of interest, would, on ordinary occasions, be rejected.

NOTE.—See *Jones* v *Huggins*, 1 Dev. Rep. 223. *Sasser* v *Herring*, 3 Dev. Rep. 340. *Dancy* v *Sugg*, 2 Dev. & Bat. Rep. 515.

VENABLE *vs.* MARTIN—Page 515.

A plaintiff who fails in his action, is liable to the costs of all the defendant's witnesses, though they were not examined, if it appear that they were called, sworn and put in the care of the sheriff.

Motion, on the part of the plaintiff, to strike from the taxation of costs, the attendance of several witnesses, summoned by the defendant, but not examined. It appeared that the witnesses were called to the book, sworn, and on motion of the plaintiff, committed to the care of an officer.

HALL, J. delivered the opinion of the court.

When it appears to the Court that a party has summoned a witness, not at all material in the suit, justice requires that he should pay the costs so incurred himself, and that his adversary should not be charged with them. But the person aggrieved should make his objections as soon as he can, after having made the discovery; one strong reason for which, is, that the judge who tried the cause, is much better qualified to judge of the materiality of a witness than any succeeding judge.

Whether the witnesses in the present case, were material or not, it is unnecessary, however, to inquire, because they amongst others, were at the plaintiff's own motion called, sworn and delivered over to the sheriff, which we all think was sufficient notice that they were summoned; and if they were not examined, he ought then to have ascertained the fact of their immateriality, and not have postponed it

to a time when the inquiry is much more difficult to be made.

Let the present motion be dismissed.

NOTE.—See *Carpenter* v *Taylor*, N. C. Term Rep. 265.

JOHNSTON *vs.* GREEN—Page 516.

An action of *debt* on a promissory note is not barred by the statute of limitations.

Debt on a promissory note, to which the Statute of Limitation was pleaded. Demurrer and joinder.

HALL, J. delivered the opinion of the court.

Before the passing of the act of limitations, actions might have been brought at any indefinite distance of time after they have accrued. This was the mischief intended to be remedied by that act. But all actions, not included within its operation, remain in the same situation as before its passage, in which class it is apprehended the present action, (namely, an action of debt upon a promissory note, not under seal) is included. For the act, in enumerating many actions, speaks only of actions of debt for arrearages of rent.

It is true, and it may appear a little strange, that a demand, upon a simple contract, should be barred, when an action on the case is brought upon it, and not barred, when sued for in as action of debt. Be that as it may, the remedy was with the Legislature, and they have so passed the law, as to make it apply to the form, and not to the subject matter of the action.

Although our act of assembly is nearly a copy of the English Statute passed in the reign of James I, yet in this respect it is very different. That Statute bars "all actions of debt grounded upon any lending, or contract without specialty," which words, if used in our act, would certainly bar the present action. But our act only speaks (as before observed) of actions of debt for arrearages of rent.

Of course, we must pronounce, that the demurrer shall be sustained.

NOTE—The action of *debt* on a promissory note, or upon any contract without specialty is now barred by the act of 1814 (1 Rev. Stat. ch. 65, sec. 3) after three years.

STATE *vs.* PENNY—Page 517.

An indictment cannot be sustained, which charges merely an intention to pass counterfeit bank notes, knowing them to be counterfeit, without charging any culpable act.

HALL, J. delivered the opinion of the court.

The substantive charge laid in this indictment, against the defendant, is an intention to pass the counterfeit bank note therein described, knowing it to be counterfeit. It is true, and it may be assumed as a legal truth in our criminal code, that it is the *intention* which constitutes the offence. But that intention must, at least in part, be evidenced by some act of the party. No act of the defendant is here charged as culpable, although the note may be counterfeit; yet he may have become possessed of it innocently, and acquired that knowledge afterwards.

No instance can be found, where such a charge has been substantiated at Common Law, and this is rendered the more probable, from the great many offences which have been created by Statute, relative to counterfeit coin. We will notice one created by Statute 37, Geo. III. where it is made an offence to have the possession of certain counterfeit coin, *without lawful excuse,* which shews that such possession was not an offence before that time.

It is true, it was held in Sutton's case, 1 East C. Law 172, by three Judges against the opinion of Lord HALE, that the possession of two iron stamps, &c. with an intent to counterfeit, &c. and utter the coin so counterfeited, was an of-

fence at common law; but the difference between that case, and the present case, consists in this—That the stamp carried with it no disguise, and a person was not so likely to acquire possession of it as innocently as of a counterfeit note, on which might be placed every disguise that ingenuity could give it.

We are of opinion that the indictment should be quashed.

SMITH *vs.* HORTLER—Page 518.

An affidavit for the removal of a cause is sufficient under the act, 1 Rev. Stat. ch. 31, sec. 120, if it state that the adverse party has considerable influence, which he will probably exert, and that many persons hold freeholds under him who may be turned off at his pleasure.

This was an appeal from Brunswick Superior Court, in which a motion was made by the defendant to remove this cause to another county; that court overruled the motion.

The affidavit on which it was founded, states in substance, that the plaintiff is a man of considerable influence in the county, and that, in the defendant's belief, he will exert that influence to obtain an improper verdict: that a great many persons hold freeds under him, who are subject to be turned off at his pleasure, and that such persons are not sufficiently independent of him, to give the defendant a fair trial, should they be on the jury.

Taylor, C. J. delivered the opinion of the court.

It highly concerns the character of a State, that its courts of justice should be so organized as to afford full assurance to every suitor, that his cause shall be patiently investigated, and impartially decided. This principle has likewise an essential operation in preserving public order, and enforcing private justice; it represses the hope of impunity, which incites evil men to the commission of crimes; promotes punctuality and fair dealing; imparts confidence to the innocent

and well disposed; and diffuses amongst all classes of the community, that reverence for the laws, and obedience to their authority, without which, liberty is but a name, and security a shadow. The apprehension that the existing judicial system would produce injustice in cases where either party was influential in the place of trial, formed one argument against its adoption, which had so much weight with the Legislature, as to occasion a provision for the removal of the causes. The only reason required by the first act, was the suggestion upon oath, of probable grounds, that justice could not be had in the county where the cause was pending. Act of 1806, § 12. As a specification of the grounds was not rendered necessary, it was easy to make the suggestion, and the removal of causes, became almost a matter of course. To remedy this, the act of 1808 was passed, which requires the facts to be stated on which the belief is founded, so that the court may judge whether the inference is properly deduced. We think it very probable that the facts stated in this affidavit may deprive the defendant of a fair trial, and that the spirit of the act, and the liberal interpretation, which, on account of the object it aims at, it certainly merits, entitle him to a removal of his cause to some other county. "The administration of justice, says *Blackstone*, should not only be chaste, but should not even be suspected. A jury coming from the neighborhood has, in some respects, a great advantage, but is often liable to strong objections: esyecially in small jurisdictions; or where the question in dispute has an extensive local tendency; where a cry has been raised, and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger, or obnoxious."

NOTE.—See *State* v *Twitty*, 2 Hawks 248. *Smith* v *Greenlee*, 3 Dev. Rep. 387. *State* v *Seaborn*, 4 Dev. Rep. 305.

STATE *vs.* YANCY—Page 519

A person may be indicted for an assault, committed in view of the court, though previously fined for the contempt. The plea of "*auterfois convict*" shall not avail him, because the same act constitutes two offences; one against the court, and the other against the public peace.

Indictment for an assault and battery, to which the defendant pleaded "*auterfoit convict*," on which the jury found specially, that the defendant for the assault wherewith he is charged, had been brought into the County Court of Wake, and, on his submission, fined for a contempt, the assault having been committed in view of the court.

The question is, whether the plea, under the facts found, forms a bar to this indictment.

The case was argued by *Burton*, Attorney General for the State; and *Browne* for the defendant. For the State was cited 9 Johns. 417; for the defendant, 4 Bl. 121. Cro. Eliz. 405. 1 Bl. Rep. 640.

Taylor, C. J. The punishment for the contempt is not a bar to this prosecution. The first was in the exercise of a power incident to all courts of record, and essential to the administration of the laws. The punishment, in such cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. The indictment for the assault, leads to the correction of the party for the disturbance of the public peace. Although but one injury is done to the individual assaulted, yet the same act constitutes two public offences; which, according to the circumstances, might require different degrees of punishment. The court may punish, in a summary way, its officers abusing its process, by oppressing the parties, or committing extortion, fraud or malpractice; yet none of these offences are merged in the contempt. If parties concerned in a cause are libelled, this amounts to a contempt of the court, and may be punished in a summary way; but may not the offender also be indicted? The same

consequence would seem to follow in cases of rescue, where the party might be punished both for the contempt and the misdemeanor. One offence violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is levelled against the general law, which maintains the public order and tranquillity.

PORTER *vs.* KNOX'S HEIRS—Page 521.

Where heirs were made parties by *sci. fa.* to an action of trespass *quare clausum fregit* originally brought against their ancestor, and after the lapse of several years the *sci. fa.* was dismissed on the defendants' motion, on the ground that they were not properly made parties, *it was held* that they were not entitled to costs, as they would have been, had they plead in abatement.

The question referred to the court in this case, is, what costs the defendants are entitled to recover from the plaintiff, upon the abatement of this suit?

SEAWELL, J. delivered the opinion of the court.

This action was originally brought against Knox, the ancestor, in trespass *quare clausum fregit*; pending the action, he died, and the defendants, his heirs, were brought in by *sci. fa.* The heirs relied upon the pleas already pleaded, and the cause remained in that situation until the accumulation of much costs, when the *sci. fa.* was dismissed by the court, upon the defendants' motion, the legality of which motion has been sanctioned by this court; and the question now presented, is, what costs are the defendants entitled to recover?

It is contended, for the defendants, that, under the act of 1777, they are entitled to all the costs accrued upon the *sci. fa.* as that act, in express terms, declares, that the party shall recover costs upon a dismission.

It is material to observe, that in legal parlance, the term "dismission," exclusively applies to the practice in Courts of Equity; and that the act of 1777 has, in no instance, au-

thorised the Courts of Law to dismiss a suit. But it is quite certain, that it has long been practised in the Courts of Law in this State, for the plaintiff to dismiss his suit, as a kind of substitute for a discontinuance. The mode of practice, no doubt, existed before the year 1777; and it seems natural to conclude, that in framing a statute to regulate the practice under the new government, those intrusted with that duty would regulate themselves, in some degree, by the practice before pursued, which, in all probability, was then, as respects the use of a dismission, as it is at the present time.

If, therefore, the dismission in use, in the year 1777, was an act of the plaintiff, and not of the court, it seems clear this was not such a one as was contemplated by the act.

It has, however, been contended, that if defendants had pleaded in abatement, they would, upon the abatement of the suit, been entitled to costs; and that the office of a plea is only to inform the court of what does not otherwise appear. This is true, and only proves there was a mode of proceeding by which the defendant might have had costs. But, suppose no motion for dismission had ever been made, and the cause had travelled to a verdict for the plaintiff, and the judgment had been arrested, as it inevitably must, could the defendants then have had costs? If, therefore, the defendants have not availed themselves of pleading in abatement, but, after considerable delay by which heavy costs have accrued, prevailed upon the court to exercise the extraordinary mode of dismission, they certainly cannot be in a better situation than if the cause had proceeded to a final hearing, and the judgment arrested, in which case neither party can recover costs. To prove that a party, by his *irregularity*, may deprive himself of costs, several cases were cited in the argument, by defendant's counsel.

Wherefore, as there is no judgment for either party, we are all of opinion that neither can recover his costs.

NOTE.—Where a suit abates neither party recovers costs, but each is liable for his own. *Officers* v *Taylor*, 1 Dev. Rep. 99. So if judgment be arrested, *State Bank* v *Twitty*, 2 Dev. Rep. 386.

CARSON *vs.* NOBLET—Page 522.

An action of trespass for chattels will lie, either upon an actual or constructive possession.

So, if the owner have the right of present possession, and can regain the possession when he pleases, though the actual possession be in another.

The question in this case was, whether the action of *trespass vi et armis*, was maintainable by the plaintiff, under the following facts, which were found by special verdict.

The subject of the action was a horse, which was contracted for by the plaintiff, with one Dobson, provided Jason Carson should, when he saw the horse, approve him. Jason, at the plaintiff's request, went to Dobson's, approved the horse, and received him into his possession, as the plaintiff's property; he then put him in possession of the plaintiff's father, until the plaintiff might chuse to take him away; the father using the horse in the mean time as his own property, with the consent of Jason. Afterwards the plaintiff being at his father's, had the horse in his possession, but not chusing to take him away then, still left him in his care, with the same permission to use him until he could send for him. One Roston passing by the father's, on his way to a trial several miles off, borrowed the horse to ride; a judgment was recovered against Roston, and the horse was sold by the defendant, a constable, under an execution.

Taylol, C. J. delivered the opinion of the court.

It seems to be well settled, that either an actual or a constructive possession will entitle a person to bring trespass. Where he has the right of present possession, though the actual possession may not be in him, it is sufficient; and although the actual possession be in another, under such circumstances as enable the owner to determine it when he please, by retaking the property, yet he is not precluded from bringing this action. The father of the plaintiff had the possession, as the depository of the plaintiff, but there was also an implied possession in the latter, as there is an owner

who employs a carrier. In the case of *Ward* v *Macauley*, 4 Term. Rep. 489, the owner had parted with the right of possession to the furniture, during the continuance of the lease, and therefore he could not maintain trespass. Lord KENYON there thought he might bring trover, in respect of the right being in him; but he afterwards retracted that opinion, and on *Gordon* v *Harper*, 7 Term Rep. 9, it was held, that in such a case, even trover would not lie. In this case, the plaintiff allowed his father to use the horse, until he thought proper to take him, and whether the horse was taken from the father or from Roston, makes no difference, since a sufficient possession remained in the plaintiff, for the protection of his property.

Judgment for the plaintiff.

NOTE.—See. acc. *White* v *Morris*, 1 Hawks 301.

DEN ON DEM. OF HATTON & WIFE *vs.* DEW.—Page 524.

When the transcript sent to the Supreme Court contains so imperfect a statement of facts, that the court cannot decide satisfactorily to themselves, a new trial will be ordered.

CAMERON, J. delivered the opinion of the court.

Owing to the imperfect statement of facts, contained in the transcript sent up from the court below, the court is unable to decide satisfactorily to themselves, the several points reserved in the statement.

Therefore, let a new trial be granted.

NOTE.—See acc. *Gilky* v *Dickerson*, 2 Hawks 341. *Banner* v *McMurray*, 4 Hawks 93. *State* v *Upton*, 1 Dev. Rep. 268. So if a point be reserved by the court which does not appear on the transcript. *Finch* v *Elliott*, 4 Hawks 61. So if it appear from the certificate of the Judge, that a case was intended to be made up by him, but none comes up with the transcript. *Hamilton* v *McCulloch*, 2 Hawks 29. *Anderson & Co.* v *Hunt*, 3 Hawks 244. *State* v *Powers*, Ibid 376. But see *Pickett* v *Pickett*, 3 Dev. Rep. 6.

Atkinson v *Clark*, Ibid 171. *Thomas* v *Alexander*, 2 Dev. & Rat. Rep. 385—which declare that it is the settled rule of the Supreme Court to affirm every judgment not seen to be erroneous. See also *State* v *Hardin*, 2 Dev & Bat. Rep. 407. *Brooks* v *Ross*, Ibid 484. *Honeycut* v *Angel*, 4 Dev. & Bat. Rep. 306. *Bronson* v *Paynter*, Ibid 393.

STATE *vs.* STEWART—Page 524.

A person who removes to another State after being recognised or summoned on the part of the State, is entitled to mileage from the place of his actual residence.

This indictment was found at October Term, A. D. 1813, at which time one Jacob Jackson was bound in this court in a recognizance in £50, to appear at this term as a witness in behalf of the State, in this case. The said Jackson then resided in Guilford county, at the distance of twelve miles from the court-house—but had prepared to remove, and shortly thereafter, did remove himself and family to the State of Tennessee, where he now resides, at the distance of three hundred miles from Guilford court-house. Along the road usually, and, by the said Jackson, actually travelled, from his place of residence to the said court-house, the distance *within* this State, is one hundred miles. At this term the said cause came on to be tried, and the said Jackson, as he was bound, attended as a witness in it, in behalf of the State; when the said defendant, R. Stewart, submitted, and was fined ten shillings. The said Jackson applied for a Witness Ticket, in which he charged mileage for the whole distance between Guilford court-house and his present place of residence.

LOWRIE, J. delivered the opinion of the court.

Our acts of Assembly, in allowing witnesses pay for attending on behalf of the State, are remedial, and ought to receive a liberal construction: By the act of 1777, C. 2, § 43, witnesses were compelled to attend the courts, when sum-

moned on criminal prosecutions, until discharged, under a heavy penalty, and that without any compensation. In the year 1779, the first provision was made for the payment of State witnesses. In 1783 mileage was first allowed to witnesses attending in civil suits, which by the act of 1800, C. 17, was extended to witnesses summoned, or recognized to appear, on behalf of the State, in the Superior Courts. The words of the act of 1783, allowing mileage to witnesses, are very broad, and, we think, sufficiently so, to embrace the case of the witness under consideration. The allowance is, "for every 30 miles travel going to, and returning from the said court, the sum of," &c.

There can be no question but these words would entitle the witness to mileage from the place of his residence, if, after he had been summoned, or recognized, he had removed to any other place within the State, however great the increased distance might have been. If the reason of this is sought for, it will be found to be in the obligation which attaches upon the witness, upon the service of process, or the entering into recognizance, and which removing from one place of residence to another, cannot discharge him from. And the obligation will remain the same, whether he moves from one part of the State to another place within the same State, or to another State—in either case, he being once bound to attend, he will incur the penalty of the law, if he fails to do so.

The serving a writ or summons, or binding a man in recognizance, to attend on a court to give testimony, lays him under no obligation not to change his place of residence, nor will his doing so weaken his claim for compensation:

We are, therefore, all of opinion that the witness in this case, is entitled to mileage to and from the place of his residence, in the State of Tennessee.

CARNEY'S EX'RS *vs.* COFFIELD—Page 526

Where a testator devises all his estate to his wife, after payment of debts, and does not direct out of what fund they shall be paid, and the will passes only personalty, having but one witness, equity will not interpose, in favor of the widow, to exonerate the personal estate, and charge the real estate with the payment of the debts.

HALL, J. delivered the opinion of the court.

In this case, the testator devises nearly all his estate to Ann Carney, his wife, after payment of his debts, but gives no directions as to the fund out of which they were to be paid; nor would that omission at all affect her interest, if there had been another subscribing witness to the will, so as that the real, as well as the personal estate, would have thereby passed to her. But, as there is only one subscribing witness, she thereby acquires an interest only in the personal estate. And, therefore, it is, that this bill is brought to subject the real estate to the payment of debts, in exoneration of the personal.

We should feel no regret in aiding her in this attempt (as she seems to have been the principal object of the testator's bounty) if authorities were not opposed to us. It seem from consulting them, to be laid down, in cases where both real and personal estate, pass by the will, that as the personal estate, both in law and equity, is the lawful and proper fund for the payment of debts, it cannot be exempted therefrom, except by express words used by the testator for that purpose, or from a clear intention that it shonld be collected from the whole tenor of the will; nor can the pretensions of the widow of the testator be strengthened from the peculiar circumstances of this case; namely, that only personal estate passes by the law. Because the rights of the heirs at law, to whom the lands have descended, are as much, at least, to be regarded as those of devisees, to whom, other than the widow, the lands might have been devised.

If, indeed, the testator had, in express terms, directed that

his lands should be subject to the payment of his debts, it would have given rise to the question (one probably of no great difficulty) whether such a will could, in any respect, affect the rights of the heirs at law? But as he has been silent upon the subject, relying upon the grounds we have first taken, we think we have no authority to interfere, and that the bill should be dismissed.

*1 Wils. 82, 3 Ves. Jun. 111.

GOLDEN *vs.* LEVY AND CARROLL—Page 527.

If one purchase goods from a factor, and pay him for them before he is forbidden by the owner, the payment is valid.

A sale by a factor creates a contract between the owner and the purchaser, and the latter may pay the owner against the orders of the factor. Hence where the plaintiff, a captain of a vessel, which was stranded, employed the defendants to sell the cargo saved, as auctioneers, which they did, and paid the amount to the owners of the goods, except the freight *pro rata* due the captain, such payment was held good.

In this case, the plaintiff was master and owner of a vessel called the Ailcy Ann, stranded on the Island of Bald-head, in a voyage from Philadelphia to Charleston. The cargo was sold by she order and under the direction of the plaintiff, by the defendants, auctioneers. This action was brought to recover the amount of the account of sales. The defendants have paid over to the agent of the owners of the goods, the amount of sales, except the amount of the verdict, which is admitted to be due, and ready to be paid, for freight *pro rata*; which amount was regularly ascertained by a broker in Philadelphia, who had Golden's account as will appear by the deposition annexed of Donaldson the Broker. The plaintiff claims the amount of sales, and the question is, whether the defendants were justified in paying the money over to the agent of the owners, in opposition to the wishes and orders of plaintiff; and thus decide the question of freight between

the plaintiff and owners in this action. A verdict was given for the amount admitted to be due, which is precisely the sum given on a former trial of the cause in this court.

Cameron, J. delivered the opinion of the court.

It is a well esteblishsd rule of law, that a sale by a factor, creates a contract between the owner and the purchaser; if, however, the purchaser pay the factor for the goods so sold, such payment will protect the purchaser from the demand of the owner, unless the latter had forbidden the former to pay the factor.

But where the purchaser pays the owner, in opposition to the wishes and against the order of the factor, such payment will be good; because the owner, being through the agency of the factor, a party to the contract; and being, moreover, the beneficial proprietor of the goods sold, has an unquestionable right to receive payment directly from the purchaser.

The defendants, in this case, being public auctioneers does not vary the principle on which it depends: their employment to sell the goods, proceeded, in fact, from the owners, whose agent, for that purpose, the plaintiff certainly was. And had they refused to account with and pay over to the owners, the amount of sales, the latter might have recovered such amount, deducting what might be due the plaintiff for freight.

It is conceded that the plaintiff had a lien on the goods delivered by him as agent for the owners, to the defendants, to the amount of the freight due him from the owners—but this lien on a part, cannot entitle him to the possession of the whole amount of sales, against the will of the absolute proprietors.

The defendants, having received the goods from the plaintiff, as the agent of the owners, and having, in the ordinary course of business, disposed of them, are called on by the plaintiff to account for the sales—they, say we have paid to the owners of the goods the amount of sales, reserving for you the amount due you for freight, which we are ready to pay you. This, in justice, is all the plaintiff can ask—and

as this is secured to him by the verdict of the jury, we are of opinion it should stand.

Rule for new trial discharged.

NOTE.—See *Symington* v *M'Lin* 1 Dev. & Bat. Rep. 291.

ARNOLD *vs.* CLEMENT LANIER'S EX'R—Page 529.

An action for deceit in the sale of a chattel, will lie against the executors or administrators of the seller, under the act of 1799 (1 Rev. Stat ch. 2, sec. 10)

The plaintiff declares in deceit, for that defendant's testator sold to him, as sound, a negro which he knew to be unsound. The defendant pleads that her testator was not guilty, and that she had fully administered, &c. The jury found her testator guilty, assessed damages, and that she had fully administered. It is referred to the Supreme Court to say what judgment shall be entered. The plaintiff wishes to proceed against the real estate.

SEAWELL, J. delivered the opinion of the court.

The act of 1799, *Chap.* 18, § 5, declares that no action of detinue or trover, or action of trespass, where property, either personal or real, is in contest, and such action of trespass is not merely vindictive, shall abate by the death of either party. This is an action of trespass, though not *vi et armis*, and the passions and feelings have no concern. It is, in substance, to recover for an act doneby the defendant's testator, whereby he has been made richer, and the present plaintiff poorer.

Wherefore, we are all of opinion that the plaintiff is entitled to judgment, and that *scire facias* be awarded against the testator's *heirs* and devisees.

NOTE—See acc. *Helme* v *Sanders*, 3 Hawks 563.

HARDY *vs.* JONES—Page 530.

If, in ejectment, the lessor of the plaintiff claim title under a grant describing the lands as confiscated lands, the property of a certain person, it is incumbent on him to shew that the lands had been confiscated to authorise the issuing of the grant.

The lessor of the plaintiff claims title to the land in question, under a grant from the State, bearing date 10th July, 1788, which land is described and conveyed in said grant as the confiscated property of a Governor White. The lessor of the plaintiff has been in possession of part of the land, claimed in said grant, from the date thereof up to the present time, but as to that in dispute, remained in possession, of part, up to the 23d November, 1793, and as to the remaining part in dispute, has never been in actual possession. There was no evidence, except the above grant, to prove the land confiscated, as described in said grant. The defendant offered in evidence, as color of title, the last will and testament of Edward Buncombe, who died——1778, in actual possession of that part of the land in dispute, which has never been in the actual possession of the lessor of the plaintiff. Edward Buncombe, in, and by his last will and testament, makes the following devise to his son, Thomas Buncombe, viz. "I give and devise all those, my freehold, lands, tenements and hereditaments, which I hold in fee simple, situate and lying on Kindrick's Creek, in Tyrrell County, North Carolina, with the rents, issues and profits of all, and singular, the said premises, unto my son Thomas Buncombe, a minor, to have, and to hold, the said tenements, lands, and hereditaments, and premises, to him, the said Thomas Buncombe, and his heirs forever, on the proviso of his paying to Elizabeth Buncombe and Hester Buncombe, his sisters, one thousand pounds proc. cash, on their days of marriage, or attaining to twenty-one years of age. My intention in this devise of lands, to my son Thomas, proceeds from my disinclination to dismember any part of the estate,

and that he shall fulfil the bequeath of one thousand pounds proc. to each of his sisters, on their arrival to the age of twenty-one years, or days of marriage ; and further, if either of my abovementioned daughters, should die before her marriage, or arriving at twenty-one years of age; in such case, the legacy appertaining to her, by my bequeath, to revert to my son Thomas; and further, in case of my son Thomas's death, without legitimate children, that my said lands, &c. before recited, shall descend to my two daughters, Elizabeth and Hester, as to heirs, to them and their children forever.

Thomas Buncombe went into actual possession of that part of the land in dispute, possessed by his father at his death, and died in possession, intestate, and without issue; after Thomas Buncombe's death, on the 23d November, 1793, a division of the lands of Thomas Buncombe was made between Elizabeth and Hester aforesaid, the former, at that time, the wife of John Goelet, and the latter the wife of John Clark, which division was made by an order of the County Court of Pleas and Quarter Sessions for the County of Tyrrell, at October Term, 1793. The surveyor and five freeholders, appointed to divide the aforesaid land, returned the said division at January Term, 1794, of Tyrrel County Court, which was approved of by said Court, and ordered to be registered, which was done, agreeably to said order, on 2d April, 1794, all which appears upon said division as above stated. The defendant, James Jones, is the tenant in possession under the heirs of the above John Clark, and Hester his wife, which heirs set up title to the land in dispute under the above last will and testament of Edward Buncombe, and the above division, as colour of title; and as to that part of the land in dispute, which Edward Buncombe died actually seized and possessed of, the possession of the same has been transmitted to said heirs, uninterrupted, as above stated, from the death of Edward Buncombe to this time: As to the other part in dispute, the same has remained in the actual adverse possession of the said John Clark and his wife, and their heirs as above, from the 23d November, 1793, the date

of the above division, to this time. The above possession of the defendants extends up to the line made by the above commissioners, which line includes the land in dispute.

1st. Is not the lessor of the plaintiff bound to prove the land mentioned in his grant to be confiscated as described in his grant?

2nd. If the lessor of the plaintiff should not be bound to prove the land confiscated, as described in his grant, does the said grant convey in itself absolute title, or colour of title?

3d. Is the above last will and testament of Edward Buncombe, and the above division, or either of them, colour of title, no petition for partition having been exhibited, on the above trial?

Taylor, C. J. delivered the opinion of the court.

Upon the first question submitted to the Court, in this case, a majority are of opinion, that the lesssor of the plaintiff is bound to prove the land to have been confiscated; and, consequently, that a new trial ought to be granted.

Entries could be made of such lands only, under the authority of the act of 1777, as had not been granted by the Crown of Great Britain, or the Lords Proprietors, before the 4th July, 1776, or which accrue to the State by treaty or compact.

The land now claimed was not the subject of entry under this law; because it had been granted previously, either by the Crown of Great-Britain, or the Lords Proprietors, as appears from the grant itself.

But by the confiscation law of 1782, the Governor is authorised to issue grants to the purchasers of confiscated lands, upon the return of certain proceedings being made to him. The grant states the land to have been sold as the confiscated property of Governor White, but no proof has been adduced, that it ever was so confiscated; which might easily be made if the fact were so, since the proceedings required by the act must have been returned to the Governor previous to his issuing the grant.

The seisin of Governor White could not be divested out of him and vested in the State, without office found, or some

matter of record. This a principle of the common law, so clear as to require no authority: and so comformable to the principles of our government as to merit quite as much respect as it receives in England, where it is considered as one of the principal barriers, placed around the liberty of the subject, that the King cannot seize any man's possessions upon bare surmise without the intervention of a jury.

Vacant lands, the State may grant, and a title so derived in the common form, would, in this court, be deemed conclusive. But when the plaintiff, who must rely upon the strength of his own title, and not on the weakness of the defendant's, shews that the lands were not vacant, he must trace his title still higher than the grant, and prove the authority on which it issued.

NOTE.—See S. C. but not so fully reported, in 2 Murph. Rep. 52.

GATLIN *vs.* KILPATRICK—Page 534.

Where a party has a legal defence and neglects to avail himself of it in a court of law, he cannot have relief in equity.

Equity cannot relieve against a verdict at law for being contrary to equity, unless the plaintiff knew the fact to be different from what the jury have found it, and the defendant was ignorant of it at the time of trial; or where effectual cognizance cannot be taken at law; or where a verdict is obtained by fraud.

Parol evidence is not admissible to shew that the condition upon which the price of a horse was to be paid, was different from the purport of the note given for the price.

This cause came up on an appeal from the judgment of the Superior Court of Craven, in which a motion was made to dismiss the complainant's bill as not containing matter of equitable jurisdiction.

The bill stated, in substance, that in February, 1806, the complainant purchased from the defendant a stud horse for £150, payable the ensuing Christmas; but that it was agreed

between them, if the horse died before the end of the season, no part of the price was to be paid, which was attested by witnesses, and a note drawn expressing the same. That the defendant refused to receive this note, as the condition rendered it unnegotiable, but repeated his determination to abide by the conditions, nevertheless; on which the complainant gave an unconditional note. That the horse died a month before the end of the season, and the defendant brought suit on the note, which the complainant employed and instructed counsel to defend; that he summoned witnesses, who failed to attend, and was also absent himself through severe illness.

Taylor, C. J. delivered the opinion of the court.

If the complainant could have made any defence to the suit brought on the note, it was strictly of a legal nature, which he had an opportunity of shewing upon trial. If injustice had been done to him on that occasion, his remedy was still in a Court of Law, by applying for an appeal or *certiorari*. The circumstance of his not having availed himsef of these remedies, will not give this court a jurisdiction, which it did not before possess. There ought to be some period to litigation; and where could it be more properly terminated than the principle of law has already directed? That where a man's claims have been decided on, by a court of competent jurisdiction, or where the opportunity was afforded him of having them decided on, he shall no longer be at liberty ty to harrass his adversary. The court cannot relieve against a verdict at law for being contrary to equity, unless the plaintiff knew the fact to be different from what the Jury have found it, and the defendant was ignorant of it at the time of trial; as where the plaintiff sued for a debt, and the defendant after verdict discovers a receipt for the demand, 3 Atkyns, 224, or where effectual cognizance cannot be taken at law, as in complicated accounts, or where a verdict is obtained by fraud; and not where the party omitted to avail himself of his legal defence. 1 Schoale and Lefroy, 205.

On this principle alone the bill ought to be dismissed;

but even if the defendant had made his defence at law, the event must have been equally unfavorable to him, because he could not have been allowed to prove by parol that the contract was different from the purport of the note. It is not alleged in the bill, that the condition on which the price of the horse was to be remitted, was suppressed by fraud, or omitted through mistake. The simple charge is, that the parties both agreed not to insert the condition, in the note, but trust it to the memory of witnesses.

NOTE.—See *Taylor* v *Wood*, 2 Hay. Rep. 332, and the cases referred to in the note thereto. On the last point, see *Commissioners of Green* v *Holliday*, 2 Hay. Rep. 384, and the cases there referred to.

DEN ON DEM. OF HARRIS AND OTHERS *vs.* MILLS—Page 535.

Where a testator in the year 1783 devised "to his son B. three hundred and fifty acres of land;" and by another clause devised thus: "I give and bequeath to my son B. and my four daughters all the rest of my estate, consisting of various articles too tedious to mention," *it was held* that B. took only a life estate under the first clause; and that the reversion did not pass to B. and the daughters under the residuary clause, but descended to the heir at law, though there was a clause in the will giving him twelve shillings.

Ejectment to recover a tract of land in the defendant's possession, upon the following case agreed. In the year 1783, William Harris devised the land sued for, together with other lands, to Hood Harris by these words. "I give and bequeath to my son Hood Harris, three hundred and fifty acres of land; and by another clause in his will devised thus: "I give and bequeath to my son Hood Harris and my four daughters, who now live with me, all the rest of my estate consisting of various articles too tedious here to mention." The testator also bequeathed to Major Harris, his heir at law, twelve shillings.

TAYLOR, C. J. delivered the unanimous opinion of the court.

The question, arising under this will, is, whether the reversion of the land sued for, passed by the residuary clause, or whether it descended upon the heirs at law? After examining the numerous cases cited, and relating to this subject, we are led to the conclusion, that the testator did not dispose of the reversion by his will, and consequently, that the plaintiffs, who derive their title from the heir at law, are entitled to judgment.

It is said in 3d Wilson, 141, and we have felt the propriety of the observation in considering this case, that cases in the books upon wills, may serve to guide with respect to general rules in the construction of devise; but unless a case cited, be in every respect directly in point, and agree in every circumstance with that in question, it will have little or no weight with the court; who always look upon the intention of the testator, as to the polar star, for directing them in the construction of wills.

It cannot be questioned, that Hood Harris took only an estate for life, under the devise made to him in the year 1783. This is too firmly established, by repeated adjudications, to be now shaken by any court; though it is difficult to reconcile such decisions with the doctrine, that the intention shall govern, and that the intention, in all general devises, is to pass a fee.

But, with respect to the residuary clause, we are not so fettered by authorities, because none are precisely in point. We are at liberty to explore the intention of the testator, and having ascertained it, are bound to give it effect.

Let any person of plain understanding take up this will, and reflect upon the common import of the words, independently of any rule of law upon the subject; and the probability is, that he would pronounce decisively against an intention to pass the fee. The word "estate," he would understand, as comprehending every thing a man owned, and if it stood alone, would be sufficient to pass every thing. But it would be equally apparent to him, that the testator might explain the sense in which he used the word; that he had explained it in this clause, and, thereby, materially re-

strained its familiar acception. The testator undertakes to specify that the estate he thus gives away, consists of (or in other words is composed of) various articles too tedious to mention. Thus the terms, as well as the description of them, are strictly referable to personal property. No person would understand the word "articles," as relating to land; nor could it be tedious to mention a reversion, although it would have been so, to enumerate the great variety of articles of which chattel property usually consists.

This probable deduction of common sense and inartificial reasoning, is supported and upheld by the general authority of the cases, in all of which the intention is collected from the particular words employed.

The rule is, that the word "estate" has a very comprehensive meaning, and will, without any additional words to enlarge it, convey whatever testator is seised or possessed of; more especially if an introductory clause in the will, indicated a design of not dying intestate as to any part.

But the word may be restrained, explained, or limited; and the court must understand it in that sense only in which the testator employs it.

On the part of the defendant, many cases have been cited to prove the position, that the words "rest of my estate," though coupled with words of personalty, will carry the reversion, remaining undisposed of, after an estate for life. This is perfectly correct, if understood with this qualification, that there must be an apparent intention to pass the real estate.

In 3 *Atkyns* 492, the words were "all the rest, residue, and remainder of my goods, chattels, and personal estate, *together with my real estate*, not herein before devised, I give to my wife," &c.

It was upon the latter words in the will that the reversion was held to pass; and, surely, language more unequivocal as to such intention, could not have been found.

In 1 *Wilson* 333, the words are: "As to my temporal estate, I dispose thereof as follows," &c. and afterwards says:

"All the rest of my goods and chattels, real and personal, moveable and immoveable, as tenements," &c. The principle of this decision perfectly accords with our opinion in the present case. *Lord Hardwick* explains it to be, that the testator himself had declared what he meant by the words goods and chattels, real and personal," &c. But adds he, "if he had not so explained himself, I do not think that the words goods and chattels, real and personal," &c. would have carried the lands by the law of England, though they might have done so by the civil law; and the word "as," is as much as to say, I mean. So, we repeat, that the testator has declared what he meant by the word estate; but if he had not so explained himself, it would have carried the reversion.

The case cited from *Cowper* 299, is distinguishable from the present by two circumstances. 1st. The will contained an introductory clause, on which considerable stress was laid by the court, as shewing that the testator meant to dispose of all his estate. 2d. The words of the residuary clause were, "all the remainder and residue of all his effects, both real and personal." On these words *Lord Mansfield* remarks, "the natural and true meaning of real effects, in common language and speech, is real property; and real and personal effects are synonimous to substance, which includes every thing that can be turned into money.

The words of the sweeping clause in *H. Bl.* 223 are equally strong; "all the rest and residue of my estate of what nature or kind soever." As the testator had two kinds of estate, real and personal, to which the words might be applied, it was with the utmost propriety the court refused to restrain the meaning of them to personal property, and destroy their operation as to real property.

Very large introductory words in the case cited from 2 *H. Bl.* 444, and the words *testamentary estate* in the residuary clause, formed the ground of decision. Testamentary is whatever may be given by will, and is equally applicable to real and personal property.

The decision in *Comyn's Reports* 164, was founded on

the words, "whatever else I have in the world."

We have been unable to find any case that amounts to an authority against the opinion we have expressed; none where the intention to pass the real estate was not easily to be collected from the will, and could not fairly be mistaken.

But there are several authorities that bear a strong resemblance to the case before us, and, at least, confirm the reasoning on which our judgment is founded.

In the case of *Timewell* v *Perkins* 2, in *Atkyns* 102, the substance of the will, which produced the question, was, "All my freehold lands in the tenure of the widow L, and the residue of my estate, consisting in ready money, jewels, leases, judgments, mortgages, &c. or in any other thing wheresoever or whatsoever, I give to A. B. or her assigns, forever." The question was, whether the residue passed to A. B. or not; and the reasoning of the Judge who tried the cause, was, on this point, as follows:

"It has been insisted for the plaintiff that the words in the preamble of the will, "as touching the temporal estate," &c. shew plainly the testator's intention to dispose of his whole estate, and that the court will never intend an intestacy of any part; and that the word estate will include lands as well as personal estate, and though coupled with words applicable to personal, will yet pass freehold.

"Although it would have been stronger if the word real had been added, yet, however, this will not do, unless there are some words that shew the intention to pass the real estate, or the court will intend an intestacy in favor of the heir at law.

"The word estate itself may indeed include as well real as personal; yet when the testator has expressed himself by such words as are applicable to personal only, I cannot intend he meant the real estate.

"Whatsoever and wheresoever must be confined to the things antecedent, and is restrained to the hop grounds and leaseholds, for if he intended to give his wife all his real estate, why did he mention only the Essex estate?

"Estate, when it is only coupled with things that are per-

sonal, shall be restrained to personals. *Cro. Cir.* 457, 449. *Sir Wm. Jones* 380.

"Here, the word estate, is expressly confined to personals, as plate, jewels, rings, judgments, mortgages, &c. which are all personal estate, and, therefore, I think the residue of the real estate does not pass.

"But supposing it would admit of a doubt, yet certainly the heir at law ought to be preferred, unless the intention of the testator, to exclude him, appears exceeding plain."

In addition to this case, we refer to 1 *Eq. Cas. Abr.* 211. *Sir T. Raym* 453. *Cowper* 238, and conclude by remarking, that the will before us contains no introductory clause; and although a bequest is made to the heir at law, there are no legatory words to take the estate from him, and it is against every just principle of construction to indulge in implication and refinement to his disherison.

Judgment for the plaintiff.

NOTE.—Under the act of 1784 (1 Rev. Stat. ch. 122. sec. 10) a devise of real estate to any person is to be construed a devise in fee, unless an estate of less dignity is given in express words, or an intention to that effect manifestly appear in the will or some part thereof.

As to what passess by a residuary clause in a will, see *Arrington* v *Alston* 2 Murph. Rep. 321. *Powell* v *Powell*, N. C. Term Rep. 315. *Reeves* v *Reeves*, 1 Dev. Eq. Rep. 386. *Speight* v *Gatling*, 2 Dev. Eq. Rep. 5. *Frazer* v *Alexander*, 2 Dev Eq. Rep. 348. *Harrell* v *Hoskins*, 2 Dev. & Bat. 479.

M'INNIS *vs.* M'INNIS—Page 541

In a caveated entry, where the evidence had been fairly and fully submitted to the jury, and the case was entirely one of matter of fact, the court would not disturb the verdict.

SEAWELL, J. delivered the opinion of the court.

The present is a contest between the parties with respect to the rights of entry of a vacant piece of land. The whole

matter of dispute arises in the locating their respective entries. From the case stated, it appears that the evidence was fairly and fully submitted to the jury, and they have found in favor of the caveator. The case was entirely of matter of fact, properly determinable by a jury, and this court perceives no reason why the verdict should be set aside.

PARK *vs.* MORRISON'S EX'RS—Page 542.

Where co-executors live in different counties, a warrant from a justice against one of them living within his jurisdiction, shall not be abated because it was served on him only, and not on those living in other counties.

A warrant, on an account, issued in this case against John and Robert Morrison, executors of Robert, deceased, *William Morrison, the other executor, not being an inhabitant of this County.* The magistrate rendered judgment for the plaintiff; and, on an appeal to the County Court, the defendant pleaded in abatement, that William Morrison, one of the executors, was not a party to the suit. The plaintiff replied, that he was an inhabitant of another County, and out of the reach of the process of a justice of the peace. To this replication there was a demurrer.

HENDERSON, J. delivered the opinion of the court.

All general rules must be departed from in cases of necessity; they are formed to meet ordinary cases only, but in extraordinary ones, we must resort to some other rule. Of the common law it is a general rule, that where two or more persons are liable on a joint contract, they must be made defendants, and brought into court; but the plaintiff is excused for omitting to do so, by shewing its impossibility. Accordingly, the course in England is to proceed to outlawry, and, in this State, to the *pluries* writ. So if some of the executors reside in a foreign country, those who live here

may be sued; and the same rule is applicable to defendants in equity. We can see no difference in principle between those cases, and the case of one executor residing without the jurisdiction of that tribunal, which has cognizance of the cause. We must, in this case, either depart from the general rule, or declare that the plaintiff has no remedy for the demand, being of a sum, within the jurisdiction of a magistrate, whose warrant runs not beyond the limits of his county. The defendants, by remaining in different counties, may, for ever, prevent a trial. We are, therefore, very clearly of opinion, that the plea should be overruled, and the defendants answer over.

STATE *vs.* LUMBRICK—Page 543.

On the acquittal of a defendant in an indictment for petit larceny, the court may order the prosecutor to pay the costs.

In no case, where the punishment extends to life, limb or member, can the court, on the acquittal of the defendant, order the prosecutor to pay costs. But in all other cases it may be done under the act of 1800, (1 Rev. Stat. ch. 35, sec. 27,) if the prosecution should appear to be frivolous or malicious.

The defendant was acquitted on a charge of Petit Larceny, and on a motion that the prosecutor should pay the costs, under the act of 1799, C. 4, § 19, the question submitted was, whether the act embraced this offence?

HENDERSON, J. delivered the opinion of the court.

The act of 1777, C. 2, organizing the Superior and County Courts, gave to the latter jurisdiction of this offence; and the section by which it is conferred, concludes with these words, "and other misdemeanors of what nature or kind soever, of an inferior nature." If the words, of "an inferior nature," had, prior to this act, a certain and definite meaning, it is admitted that the mode of using them here, would not have changed it. But, as no such precise meaning was

attached to them, we know of no more certain rule, than the one contained in the act. It gives to the Superior Court jurisdiction over all offences affecting life, limb or member, and to the inferior courts, jurisdiction over all petty larcenies, assaults and battery, &c. and other misdemeanors of an inferior nature. The act since passed, declaring in what cases the State shall be liable for costs, does not affect this case; for it is evident the Legislature did not intend to graduate offences. They had other objects in view, and, except as to them, were careless of the expressions employed. It is evident too, that the act was penned by a person totally ignorant of technical terms, for he thought capital punishment and corporal punishment were the same. The rule, therefore, which we should lay down, and which is founded on the act of 1777, is this, that in no case where the punishment extends to life, limb or member, can the court, on the acquittal of the defendant, order the prosecutor to pay costs. In all other cases, it may be done, if the prosecution should appear to be frivolous or malicious.

Let the prosecutor pay the costs.

Note—See acc. *State* v *Cockerham*, 1 Iredell's Rep. 381.

JONES AND WIFE *vs*, WILLIAM SPAIGHT'S HEIRS—Page 544.

A devise of land "to A. and the male heirs of his body, lawfully issuing, and if A. dies without leaving lawful issue as aforesaid, I give the land to the eldest son of B;" means a dying without issue living at the death of A., and the devise is a good executory one to B's oldest son.

George Merrick, by a clause in his will, devised as follows:—"I give and bequeath to my nephew, George M. Leach, and to the male heirs of his body, lawfully issuing, the lands purchased of Jeremiah Vail. Now, if the said George M. Leach dies, without leaving lawful issue as afore-

said, in such case I give the said lands to the eldest son of my niece, Mary Spaight, and Col. Spaight, deceased."

The eldest son of Mary Spaight and Col. Spaight, at the date of the will, and at the death of the testator, was Wm. Spaight, who died shortly thereafter, leaving the defendants his heirs at law.

George M. Leach has since died intestate, and without issue, leaving two sisters (one of whom is wife of the plaintiff) his heirs at law.

The question submitted to this court, is, whether the plaintiffs are entitled to claim any, and if any, what part of the lands comprehended in the above devise?

HENDERSON, J. delivered the opinion of the court.

We are, in fact, called upon to say, whether the devisor meant that his lands should vest in William Spaight, on the death of George M. Leach, without having issue living at his death, or whenever the issue of George M. Leach should fail, however remote that period might be; for if the devisor meant that they should vest on the happening of the first mentioned contingency, the devise to William Spaight is good, as an executory devise, and the plaintiffs are entitled to no part of the lands; if, on the happening of the second, they are entitled to part part of them, as some of the co-heirs of George M. Leach, the devise to William Spaight being void, on account of the remoteness of the contingency.

It is really questionable, from the words themselves, on which contingency the devisor intended the lands to vest in William Spaight. But when we consider the one as a lawful intent and may be effectuated, the other an unlawful one and must be frustrated, we have no hesitation in saying that he meant that the lands should vest in William Spaight, on the death of George M. Leach, without leaving issue living at his death; for where the words are doubtful, we should presume a lawful, rather than unlawful intent; and the cases relied on by the plaintiff, fortify us in our opinion. For in England, where they have estates tail, these words are construed to mean, when applied to real estates, an indefinite failure of issue, to effectuate the presumed intent of the

devisor; that after the issue of his favorite devise had failed, the next object of his affections should succeed to the estate; and this they were enabled to do, by declaring the words created an estate tail in the first devisee, with a remainder to the second devisee.

But, with regard to personal estates, they could create no estate tail to support the remainder; if they said the testator meant an indefinite failure of issue, they made void the limitation, and the absolute interest vested in the first legatee; to avoid thus defeating the intent of the testator, they declared that he meant the failure of issue at the death of the first legatee. We think this abundant authority for us, in this country, where we dave no estate tail, to say, that the devisor intended on the death of G. M. Leach, without leaving issue then living, that William Spaight should have the lands. In other words, to give this clause the same construction as if applied to personal estate; for certainly the reason of giving it a different construction when applied to real, from that which it receives when applied to personal estate, fails in this country.

We do not believe there is any thing in the idea, that the words of the will created an estate tail in G. M. Leach, which the act of 1784 instantly converted into a fee simple; for we think, since that act, a fee tail cannot for a moment exist; that the words which before that act created an estatate tail, since create a fee simple; for it is certainly as competent for the Legislature to declare the import of words, as it was for the founders of our unwritten or common law: and it is by law, either statute or common, that particular words create particular estates. In the British decisions, where a different construction is given to words as they apply to real or personal estate, an estate tail is given, expressly or by implication, to the first devisee; and where the happening of the contingency is plainly tied up to the death of the first devisee, it has been construed an executory devise, and not a remainder dependant on an estate tail, 7 Term Rep. 589, and the case of *Pells* v *Brown*, Cro. Jac. 590, a leading one on executory devise, fully illustrates the doctrine.

We cite no authorities, because we think we act in conformity to principles which none will dispute; whatever difficulties exist, arise from their application.

We are, therefore, of opinion, that the plaintiffs are not entitled to any part of the lands mentioned in the devise.

NOTE.—See *Bryan* v *Deberry*, 2 Hay. Rep. 356, and the cases and act of Assembly referred to in the note.

MANGRUM'S ADM'RS *vs.* SIMMS—Page 547.

One administrator, where there are two, cannot discharge a debt due to the estate, by receiving a proved account against the intestate, although the receipt purports to be in satisfaction of the debt. But a payment to one of the administrators would have been good.

Debt against the defendant: pleas—payment, satisfaction, release. The defendant produced a receipt signed by one of the plaintiffs, administrators of W. Mangrum, for a proved account of *Ballord* v *the intestate*, "which I receive as payment of a bond by Sims to the administrators of W. Mangrum."

The question submitted is, whether such receipt maintains either of the pleas?

HENDERSON, J. delivered the opinion of the court.

The acceptance of the account mentioned in this case, cannot be considered as a payment of the debt; if it operates to the destruction of the demand, it must be by way of satisfaction. Had it been a payment made to one administrator, it would unquestionably have been good; for then, it would have been the performance of the thing stipulated; it would not have rested its discharge of the debt on the agreement of the administrator. A satisfaction is a very different thing; it is not the performance of the act stipulated to be done, but the performance of another act in its lieu, its validity depending doubly in agreement. The case, then,

resolves itself into this question—can an administrator (where there are others) by his agreement, alter or change the nature of the duty or debt due or owning to his intestate? We think he cannot. Administrators (where there are more than one) act under a joint commission, not a joint and several one: they have no interest in the estate, only a bare authority; there are some modern *dicta* to the contrary; but we admire the old rules, which confine those who have an authority only, and no interest, strictly to their authority; it prevents abuse of power and injures none; it prevents speculation, and compels those who have any agreements with the estates of dead men, to perform them, not to get clear of them by agreements with those who have no real interest in the estates; for the claims to commissions do not give an interest in the estate; they are only a compensation for the care and trouble of the administrator. It is unnecessary now to decide, whether executors are not placed in the same situation, since the passing of the law taking the surplus from them. Nor whether such a satisfaction as the present would not have been good, if agreed to and received by a sole administrator.

Let there be judgment for the plaintiffs.

SILER *vs.* WARD---Page 548.

When a personsigns a paper which may relate to his personal, or to his politlitical character, if it is intended to relate to the latter, it ought, for the sake of certainty, to be so expressed. But if the paper signed be peculiar to his political character, there is no need of any addition to his signature. Therefore a warrant signed by a justice of the peace, though he does not mention his official character, cannot on that account be avoided.

Motion for a new trial, on the ground that a warrant issued by a magistrate was improperly received in evidence. The paper was signed by the magistrate in his proper name,

but nothing was annexed to the signature, denoting the act to be official.

HENDERSON, J. delivered the opinion of the court.

Where an act is done by a person, which is referable either to his natural or political capacity, certainty requires that it should appear in the act itself, that it was done in his political capacity, to make it an official act. But where the act is peculiar to his political capacity, there is no necessity of a declaration that it is done in his official capacity; for the act itself so declares. The writing offered in evidence in this case is peculiar to the official capacity of Mr. Smith; it was, therefore, entirely unnecessary for him further to declare in what capacity he acted it. It would be perfect tautology to do it.

Let the rule for a new trial be discharged.

CAROLINA

LAW REPOSITORY.

VOLUME II.

CASES ADJUDGED IN THE

SUPREME COURT OF NORTH CAROLINA,

AT

January Term, 1815.

[HARALSON *vs.* DICKENS—Page 66.

Any bond, contract or agreement, for the sale of the deputation of the office of clerk of a court, by which the party undertakes to pay a sum certain and not out of the profits, is void under the Stat. 5 & 6 Edw. 6, ch. 16 (1 Rev. Stat. ch. 80, sec. 2.)

This was an action of covenant, founded upon certain articles of agreement, executed the 13th of November, 1811, whereby the defendant, who was Clerk of the County court of Person, employed the platntiff as his deputy, and authorised him to retain, for his services, "one half the profits arising from the date of the contract," which they calculate to be one hundred dollars; which the said Harralson promises, at every term, the sum of twenty-five dollars, to pay the said Dickens as Clerk of said county—also, one half of fees on marriage licences, said Dickens is entitled to—and agreed to between both parties." The concluding clause of the agreement is as follows: "And the said Haralson doth

oblige himself to pay over to the said Dickens, as before mentioned, one half of the profits which may be collected, which is one hundred dollars a year, to be in four instalments. viz. twenty-five dollars every court in a year; also, one half of the fees collected on marriage licences."

The Judge before whom the cause was tried, directed a non-suit, from which decision the plaintiff appealed to this court.

Norwood, for the defendant. This contract is rendered void by the statute of 6 Ed. VI. c. 16, which enacts, that all agreements, covenants, bonds or assurances for any of the public offices therein specified, or the deputation thereof, shall be void. Such contracts are void where a certain annual sum is reserved to the principal, though the profits amount to more than the sum reserved to be paid by the deputy. Mod. Ca. 234. A sum in gross cannot be reserved to the principal. Sal. 468.

Nash, for the plaintiff. The statute does not affect those contracts where the sum to be paid is reserved out of the profits of the offce; for then, the principal only reserves part of that which was wholly his before. This is settled in *Godolphin* v *Tudor*, 6 Mod. 234; and in *Culliford* v *Codonny*, 12 Mod. 90, the very point came in question, and it was held that a bond by a deputy to account for the profits he receives, and to pay his master one half of them, is not within the statute; for it is reasonable that the deputy should be paid for his trouble. In the case before the court the covenant is to pay half the profits, which amounted to one hundred dollars a year. But if this point should be adjudged against the plaintiff, he is at all events entitled to recover half the money received for marriage licences; that being, clearly, only a reservation of half the profits which have arisen from that source.

Norwood, in reply. The profits of this office were altogether uncertain. It was impossible to estimate them prospectively; yet the sum to be paid is fixed, so that whether

twenty or two hundred pounds were received by the plaintiff, he was bound to pay over one hundred. If by the parties arbitrarily stating a certain sum as the profits, a sum in gross might be reserved, the provisions of the statute might easily be evaded. On this point, the reasoning of Lord Loughborough, in *Garforth* v *Ferson*, 1 H. Bl. 331, is strong and conclusive. As to the claim for marriage licences, we resist it on the ground that if any of the conditions of a bond be void by statute, the whole bond is void. *Willes*, 574.

Per Curiam. The plaintiff, in this case, brings his action to enforce an agrement by which he has undertaken to pay the defendant one hundred dollars per annum, in quarterly instalments, for five years for the deputation of a clerks office; and it is recited in the articles, that this sum is one half the estimated profits. In the same contract it is agreed the defendant shall receive one half the fees of marriage licences during that period, and that the agreement is to continue for five years, unless sooner dissolved by death or consent.

It has been insisted on in the argument of the plaintiff's counsel, that the plaintiff was only bound to pay one half the profits, and that the sum set forth was only by way of description, and therefore the case was not within the statute of Edward the 6th, against selling offices.

We are all, however, of opinion, that no such construction can be put on the agreement, and that in an action by the defendant against the plaintiff, he would not be allowed to shew what were the profits—that he has undertaken to pay a sum certain, not out of the profits, but at all events, and that, therefore, the case is clearly within the statute. As to the other ground contended for, that he ought to be permitted to recover for the loss of marriage licence fees, we think it altogether insupportable; because the statute having declared all contracts, bonds, agreements, &c. for the sale of the deputation of such an office absolutely void, no action can be supported upon either of them.

Wherefore, we are of opinion, the rule for a new trial should be discharged.

WORTHINGTON *vs.* COLHANE—Page 68.

When a statement is referred to in a bill in equity and prayed to be taken as part part of it, a copy of the statement must be served on the defendant; or it will be equivalent to no service of the bill, and advantage cannot be taken of it by plea in abatement under the act of 1782 (1 Rev. Stat. ch. 32, sec. 4) which applies only to a case of an *illegal* service, as where the bill has not been served ten days before court, and not to a case where there has been no service.

This was a bill in equity, in which the complainant referred to a statement annexed to his bill, and which he prayed might be taken as part of it.

The defendant pleaded in abatement, that he had not been served with a copy of the bill ten days before the court, for that no copy whatever of the statement, had been served on him. The plea was overruled in the Superior Court, from whose judgment the cause was brought by appeal to this court; where it was submitted without argument, and the opinion was delivered by

SEAWELL, J. This point has already been determined, and, we think, properly, as reported in 1st Haywood's Rep. 286.

To give a different construction to the act of 1782, c. 11, § 2, would be abating the bill for an inconvenience which operated only upon the complainant: The court must necessarily perceive, that the complaint, as appears of record, has proceeded regularly, before any order pro confesso will be made. Upon examining the copy which is returned served on the defendant, that would appear, incomplete, and would, therefore, be the same in effect, as if the sheriff had returned upon a full copy "not served on defendant." where, however, a full copy is served, but within less time

of the ensuing term, than the act has allowed the party to prepare for his defence, the time of service must be disclosed by plea, as it would not otherwise appear. The opinion of the court in the case referred to, is so able and luminous, in the exposition of the act, that we deem it unnecessary to add further than our entire concurrence with the opinion of the court. And are, therefore, all of us of opinion the plea should be over-ruled and with full costs in both courts.

NOTE.—See acc. *Jones v Stokes*, 1 Martin's Rep. 36. S. C. reported *anonymously* in 1 Hay. Rep. 286.

BEARD AND MERRILL *vs.* LONG—Page 69.

When an ancient ferry has been established and duly kept, the court will not erect a new one so as to injure the old one, unless it be evident that the public sustains an inconvenience for the want of it; the public faith to the first grantee ought not to be violated upon a speculative possibility of general convenience.

This was a petition to establish a public ferry on the Yadkin River. The reasons why the prayer ought to be granted were stated at length in the petition, and a diagram accompanied the papers, shewing the respective distances by the way of the old ferries and the proposed one. The cause was ably argued by *Norwood* and *Nash* for the petitioners, and *Henderson* and *Brown* for the defendant; the principal topics urged on either side are noticed in the judgment of the court.

Per Curiam. The petitioners ask of the court the establishing a ferry for the benefit of the public: the petition, therefore, is substantially to be considered as the prayer of the community—for whose sake all public offices are created. It is necessary, therefore, to examine what are the facts which appear in this case.

It seems that the place at which the petitioners desire

leave to establish a ferry, is a little more than a mile below one ferry, and not as much above another; that both these ferries are kept in good repair, and it does not appear that any inconvenience exists, or has existed, for want of expedition in passing at either of them: the price of ferriage can be no imposition, as that is to be regulated by the county courts, and may, therefore, be considered as dependent upon *public will.*

The river, however, is but about half the distance in width, and is smooth and gentle, and would authorise the petitioners, it is believed, to transport, for lower prices; and in travelling nine miles, not quite one mile would be saved in distance on one road, and a few yards lost on the other; it also appears that there is no public road leading to the place for the new ferry; but that the petitioners have, "by consent of the proprietors of the lands through which they pass," opened two roads, which are now in common use; and that they "are willing to keep the said roads in repair with their own hands and such of the neighboring inhabitants as have promised their voluntary assistance: It is also stated in the case, that the existing ferries are old established ferries; and from a fair examination of all the roads, it does not appear that any decided preference can be given (every thing taken into consideration) to either of them: Upon this state of the facts, the court is to determine how far the public, for whose benefit the petitioners supplicate, would be accommodated by allowing the prayer of the petition: and in this determination, it is for the court to infer, who, in this respect exercises the province of a jury.

The sole object of the law, in conferring every public appointment, is the promotion of *public* convenience: and, though it is true, that in pursuing this great end, *private* interest must yield; yet, it would upbraid justice and the majesty of tha law, by supposing it capable of sacrificing individual interest for any other purpose. The person who opposes the present petition may say to the law, "you have granted to me the right of a ferry many years ago, which has always been, and is now, in good repair; at which it is

perfectly convenient for every body to pass, as much so at at the new ferry: I have been at great expense in fitting out my ferry, and have entered into bond to keep it in repair; that it was understood between us both, my interest should not be impaired but for my own neglect, or for the benefit of the community; and that though you have the *power*, yet you cannot *rightfully* exercise it but in a case where it is to punish me or advance the public good." To this it has been answered, that the petitioners have an equal right to participate in all the benefits derivable from the use of their own property; and that as they have a place on the river where they might derive profit from a ferry, they ought not to be restricted or placed in a worse situation than the defendant, merely because he obtained his ferry first; and withal, that cupidity being the grand motive for all human action, it should be fostered, where its gratification would result in public convenience; that though the establishment of the new ferry might curtail the profits of the old one, yet the rivalship which would follow, would ensure attention and good conduct at both.

In the present enquiry, the force of this argument has no bearing. If to have a *public* ferry was a right common to every body, and was acquired at pleasure by constructing boats and opening roads, it might possibly apply; but it ought to be recollected, that the law (and, as we think, a very wholesome one) under certain limitations, has taken it from every citizen, and that *none* is to exercise it but by licence and entering into bond; and, that the defendant, Long, has obtained this licence from the same source to which the petitioners make their application—the law: And that it behooves this authority to observe whether, consistently with the good faith of its engagement with Long, it can benefit Beard or Merrill; for to make it necessary to obtain a licence upon which no tax is paid the public, and at the same time to say the court is bound to grant it to all who apply, would be absurd. And to say also, that it would be *equitable* or *reasonable* for the court to interfere where the effect of granting the petition would be *only* to benefit the petitioners at

the *loss* of defendants, would be more so. The law has wisely considered, that, by permitting every one at pleasure to keep a ferry and establish his own rates, great public inconvenience would result, from all being in bad order; that they would be so multiplied and the emoluments so trifling, as not to be sufficient to defray the expense:—The emoluments therefore, are not an act of public favor, but intended as a remuneration for public services—the end in view is the facility of passing. In what respect, then, is the public convenience suffering for want of the new ferry? Are the citizens *at large*—the public, put to any difficulty in crossing this river which would be obviated? Do the citizens at large travel an unnecessary distance which would be remedied? The answer in both cases is, no: but it is said the narrowness of the stream would enable the petitioners to perform the *same benefit* to the public at a *cheaper rate*, and, therefore, it would be servicable to the community. Now this is merely speculative, it might turn out, upon experiment, that the fact was otherwise: that the least swell in the stream would make it more rapid by being confined to a narrower channel; and the circumstance of there being two ancient ferries, the one a little above and the other just below, established at a time when ease and convenience were principally consulted, is a strong proof at least of the opinion entertained by those who were acquainted with the nature of the stream; and, if it really be the case, as the petitioners state, that the road from Smith's to Salisbury, would be better, and one mile shorter, and cross the river at a much better place for a ferry, it is a little unaccountable that, with all these inducements, the road should at first have run where it is; and, not less so, that the eyes of the community should have so long remained closed against so obvious a benefit. If therefore, any inference can be drawn from the facts and circumstances, they are *all* against the petitioners. The present application, then, seems to be substantially the same as an offer to *underbid*. Then the low price would be attained; but surely such an offer would deserve to be scouted by every court having just regard to its own dignity,

as entrusted with the administration of the laws, if we have a just idea of the terms upon which such grant is made. There is another reason not without its weight. How can the *public* have an interest in a ferry at a place to which there is no way for the public to travel? How then can it be said the public convenience would be promoted by the establishing a ferry, when it is left in the power of every individual through whose lands the way may pass, to shut it up at pleasure? Again—the road leading from the new ferry to Smith's, runs so near the old road as to induce the belief that it would be unnecessarily burthensome to the community to keep both in repair. This, therefore, would be a good *public* reason against a new public road; and if it is to remain a private way dependant upon the petitioners and those who are to contribute "voluntary assistance" for being kept in repair, it is easy to foresee, from a comparison with public roads on which individuals are obliged by law to work, what will be its condition: And if there are other motives which sometimes stimulate to action, that of itself ought, without great *manifest* public convenience, to induce the court to withhold interference.

Wherefore we are of opinion that the petition should be dismissed.

NOTE.—See *Anonymous*, 1 Hay. Rep. 457.

STATE *vs.* NEWMANS—Page 74.

In an indictment in the county court it is not necessary since the act of 1784 (1 Rev. Stat. ch. 35, sec. 12) to describe the defendant by the addition of his occupation.

And even if the indictment were defective from the omission of the addition, a plea in abatement which commences "and the said A. B. (the defendant) comes" &c. is in substance defective, since it admits the defendant to be the person indicted.

The defendant was indicted for an assault, by the name of *William B. Newmans*, without any addition. To this he

pleaded in abatement, "and the said W. B. Newmans is by trade a ship carpenter, by which addition he ought to be distinguished, &c." To this plea a demurrer was entered on the part of the State, which coming on before LAWRIE, J. was by him referred to this court.

It was submitted without argument.

SEAWELL, J. delivered the opinion of the court.

We are all of opinion that there should be judgment for the State, on the point submitted: we deem it unnecessary to resort to any other authority in support of the bill of indictment, than the act of assembly originally passed for curing indictments in the county courts, and afterwards extended to the superior courts. The plea is grounded upon a mere formal defect, and that act declares, in substance, the indictment shall be sufficient to all intents and purposes, if it contain the charge in a plain, simple, intelligible manner.

If, however, the act of assembly is laid out of the question, the plea itself is defective; it commences, "and the *said* William B. Newmans, comes, &c." By this plea, the defendant admits himself to be the *same* person indicted. The object of the law in allowing the plea of misnomer, is to save one the expense and trouble of answering, who has been wrongfully called in question, or to prevent one man from being arrested for another: the plea goes not to the merits of the charge, and when once it shall appear to the court that the person indicted is really before them, it is of no consequence by what name he is called; for all evidence must be shewn to have relation to the *person* then on trial. To prove the insufficiency of the plea, the case of *Roberts* v *Moore*, 5th Term, 487, is in point; and though that was the case of a special demurrer, yet as we think the defect in *substance*, the principle is the same.

Wherefore, let there be a *respondeas ouster* awarded.

NOTE.—The act 1811 (1 Rev. Stat. ch. 35, sec. 12) applies to indictments n the Superior Courts, and cures the same defects as were cured in indictments in the county court by the act of 1784.

McMILLAN *vs.* SMITH AND WALKER—Page 75.

When a person applies for the extraordinary remedy of a *certiorari*, he ought to show good reason why he did not avail himself of the ordinary remedy by appeal; otherwise a *certiorari* will not be granted.

In considering the propriety of sustaining or dismissing a *certiorari*, on an appeal from the decision of the Superior Court, the court will not notice affidavits on either side, which have been made and sworn to since the case was transferred to the Supreme Court.

A *certiorari* had been granted in this case by LOWRIE, J upon the affidavit of Smith, which stated in substance, that a suit was instiuted against him and Walker in New Hanover County Court, by McMillan; and that the cause was pressed in the deponent's absence, on Monday early in the afternoon of the first day of court, and a judgment obtained. That he understood a standing rule of the court had set apart the first day of the court for county business, and believed that no jury cause was usually pressed on that day; that the county business was not finished when the judgment was taken, which was done by surprise in the absence of his witnesses and himself, although the plaintiff knew that he defended the suit in person. That the note on which the suit was brought, was lent by him to Walker without receiving any consideration, and passed by Walker on an usurious contract, which plea had been entered and could have been maintained, had the witnesses attended. That the suit was brought against both the maker and indorser.

The counter affidavits of Mr. Meares and Mr. Davis, stated that the practice of the County Court was to give a preference to motions on the first and second days; but if no motions were made, to proceed peremptorily on the docket, unless postponed by consent of the bar. After those days jury causes have a preference, although motions are, still made through the term when no cause is on trial; that judg-

ments were taken on the first day of the term immediately preceding that, when the judgment complained of was taken; and that a motion was made shortly after the last judgment was entered.

The cause came on upon these affidavits before the Superior Court of New Hanover, when the Judge ordered the *certiarari* to be dismissed, from which decision an appeal was taken to this court.

Together with these affidavits, two others were transmitted to the Supreme Court, which, by an endorsement of the clerk of New Hanover Superior Court, appear to have been filed in his office posterior to the term of that court. The affidavit of McMillan states his information and belief, that the note was transferred to his agent for a good and valuable consideration; and that Smith, after the judgment recovered in the County Court, promised to pay the money if indulgence were granted him, and it was the refusal of this which prompted him to apply for a *certiorari*.

The affidavit of McPherson states, that Smith told him, after the judgment, that the debt was just, that he only wanted time to pay the money; and that he intimated no design to apply for a *certiorari*, until indulgence had been refused by McMillan.

Strong, for the plaintiff.—The ground of surprise is completely negatived by the affidavits of Meares and Davis, which shew that the judgment was taken in the ordinary course of practice. Motions, it is true, were entitled to a preference on the first day; but when none such were before the court, the business of the docket was to be kept in progress. Was that to be suspended until it could be ascertained whether all the motions had been brought forward? The defendant then had an opportunity of defending himself, and as he shews no reason why he did not appeal, he cannot be entitled to the remedy he seeks.

Henderson, for the defendant.—This cause ought to be re-tried to give the defendant an opportunity to substantiate his plea of "usury;" because it appears by his affidavit, that the note was obtained from Walker upon an usurious con-

tract. How is this answered? McMillan says he believes it was fairly transferred to his agent; but McPherson, the agent, who obtained it from Walker, and must have known the consideration, is utterly silent on that head. This tends strongly to corroborate Smith's affidavit.

CAMERON, J. delivered the opinion of the court.

In deciding on the propriety of retaining or dismissing the writs of *certiorari* obtained by the defendant Smith, a majority of the court exclude from consideration the affidavits of the plaintiff and his agent, which appear to have been improperly filed and sent up with the papers in this cause; in as much as they have been made and sworn to *since* the cases were transferred to this court by appeal; and regard only the affidavits which were read in the court below.

Whenever a party applies for an extraordinary remedy, to have his cause re-examined in a superior tribunal, he ought to shew some satisfactory reason why he was unable to avail himself of the ordinary remedy by appeal from the judgment of the inferior jurisdiction.

The judgments complained of by the defendant, were taken, according to his own statement, on the first day of the County Court; he made no attempt to appeal, nor does he pretend to account for his not having done so—consequently, the writs of *certiorari* must be dismissed with costs.

Judgment for plaintiff.

SEAWELL, J. I cannot concur in the opinion which my brethren entertain on the present question: For it seems to me, that in dismissing this *certiorari*, we are giving up the *end* for the *means*, and sacrificing the substance to the shadow. It appears that the affidavit upon which the writ issued, was retained by the Judge, and that the one which is now to be considered, was made by the defendant Smith, from the best of his *recollection:* this affidavit charges that the judgment was obtained in the County Court, out of the ordinary rules of practice, and in the absence of himself and his witnesses; and that he defended his own cause in person, and had put in the plea of usury: and moreover states, that the transaction was usurious. The plaintiff moves to dismiss

the *certiorari* upon the joint affidavit of Mr. Meares and Mr. Davis; and this affidavit, at *most*, only states that causes were sometimes tried on Monday by *consent*.

Now, the defendant Smith was entitled by law to defend his own cause, and if according to the course of practice his consent was necessary to the trial of his cause, he had a right to withhold it, and was therefore under no obligation to attend the first day. So far then it is apparent a judgment has been irregularly taken: and all *nigh cuts* or extraordinary proceedings, which are calculated to elude a full examination, are the strongest evidences of want of merits. If the claim was well founded, a judgment on the next day would have answered every purpose.

But it seems, in the opinion of a majority of the court, that it behooved Smith in his affidavit the reason he did not appeal to the Superior Court. I ask why is it necessary (for at *one* time it probably might have been important?) The answer will show how important it is at this stage. Whenever an individual applies for assistance, which it is in the *discretion* of the court to grant; the bare circumstance of his not having pursued a plain remedy he was of *right* entitled to, and which it was convenient to do, raises a presumption that his claim is groundless, and that his object is vexation and delay: and whilst such presumption *exists*, the court deem it unjust to interpose. But whenever the presumption arising from such circumstances is removed by an explanation, and the court is enabled to perceive the applicant has merits, it is the anxious office of a court of justice to afford its aid. If the plaintiff had produced no affidavit to rebut the charges of the defendant, and the affidavit in court had been the *original* one, or if the original was not before the court through the neglect or default of defendant, the case then would have been widely different.

But he has thought proper to answer the defendant, and from this answer it appears evident, that the first impropriety commenced on his own side, in obtaining the judgment; and it is material to observe that this affidavit, made by officers of the County Court, does not even hint at the opportu-

nity defendant had to appeal; from which it may be inferred, that the original affidavit did explain that reason; and that it was known to these gentlemen the defendant had it not then in his power. The court, then, which is moved to dismiss the certiorari, is obliged to perceive that there is the strongest evidence of the injustice of the plaintiff's cause, *upon record*, arising from his own conduct as a *wrong doer*; whilst it is called upon to suppress all further enquiry on account of a *subsequent* irregularity or neglect of the defendant, the *injured person.*

There is something further in this case worthy to be noticed. The plaintiffs have lodged in the office an affidavit which has travelled with the papers to this court, as appears, altogether unauthorized. This affidavit is made *after* the hearing in the Superior Court, when it is fair to presume the plaintiffs had a copy of the affividavit of defendant before them. By this affidavit, the plaintiffs do not presume to *deny* the usury charged by defendant, but are particularly careful to answer respecting the *manner* of obtaining the judgment.

This affidavit, however, the other members of the court seem diposed to lay out of view. This, I think, should be the case as to every purpose for which the *plaintiff* would use it; but as to every other, to allow the defendant all the benefit he can derive from it. The plaintiff, by his own act, has made it a part of the case so far as it may operate against him, and to that end it should now be considered in the same manner as any other fact which appeared from the record, though not noticed in the trial below.

The case, then, may be thus simplified. The party asking the assistance of this court to be relieved from an unjust recovery, has acted in such way, as at *one stage* in the proceedings, would have cast suspicion upon the justice of his case, and *implied* a disposition to delay; who is now turned out of court on account of this presumption, with an admission upon record, (for it is not denied) that his complaint was well founded. The court, in its *discretion*, say to the defendants, "depart hence, we hear you no farther; for though

it is admitted by the plaintiff, that the judgment you complain of was irregularly and *unfairly* obtained, and upon a contract forbidden by law; yet as you, on your part, in making out your case, did *at one time* act in such way as would *imply* you had no right to complain, this *presumption* shall overturn the *fact*, and the temple of justice shall be shut against you."

Courts of law, when called upon to afford an extraordinary remedy, act upon the same principles as a court of equity: and suppose a bill should be filed in a court of equity to be relieved from a judgment, which was charged to be had on a bond that was paid, and the bill should set forth no circumstances why the complainant did not make defence at law? It will readily be admitted that a demurrer to the bill would be allowed, and the complainant would then share the same fate with these defendants; but suppose, instead of demurring, the defendant should answer and admit that the bond was paid, and that the judgment was unjust, would a court of equity dismiss the bill? It certainly would not, but would enjoin the plaintiff at law perpetually. Or suppose the bill was to open an account without pointing out the errors, and defandant should admit the mistake, it is apprehended the court would retain the bill in both cases. And it should be remembered, when a party moves to dismiss upon the strength of his affidavit, every thing which is not denied is then to be taken as admitted. And after all, it *may be* that the original affidavit steered clear of the objection to the present; that it was no part of the defendant's duty to have this forthcoming; and it is not *presumable*, a certiorari would have been granted upon one which, *when it was made*, seemed for the sake of delay, and was therefore to be presumed false. It therefore seems to me, there has been a scrupulous regard to the *form* of proceeding at the manifest expense of the *justice* of the case, without keeping in view that the great design of a court of justice is to afford to every citizen the full benefit of the laws, and that *rules* which courts have adopted are nothing else than instruments to *effect* that purpose, and that as it is evident the plaintiffs,

by this irregularity, have deprived the defendants of all defence in an action founded upon an illegal contract, this court should allow that benefit which was improperly withheld; and more especially in a case like the present, where every thing should be presumed against the plaintiffs, on account of the course they have pursued; and who now are straining to stifle a fair hearing, by which the defendants, if injured, are cut off from all redress. The plaintiffs, however, if they have a right to recover, run no risk. The defendants must give security to perform the judgment of the court, and if, really, they have no defence, the plaintiff will recover again. If the plaintiff has recovered upon an unlawful contract, it is meet the laws should be respected; and as to delay, the plaintiff has brought it on by his own conduct. It was said during the discussion of this case, that it appeared by defendant Smith's own statement, that the usury complained of, did not relate to any part of his contract, and therefore he could not take advantage of it; that if he made a note *bona fide* to Walker, and Walker negotiated upon an usurious contract with plaintiffs, Smith could not avoid it. This may be true and yet not material in this case, because this is somewhat strangely, a joint action, and at least Walker, one of the defendants, was entitled to the benefit of the plea: and although the proposition may be true in case of a *bona fide* note by Smith to Walker, when it comes to the hands of a subsequent innocent purchaser, who is not to be affected by an intermediate indorsement upon usurious consideration, yet this case is certainly different in one of the particulars; for the note is first negociated to the plaintiff's agent upon a usurious consideration, and it is the usurer who is plaintiff and not the fair purchaser; and it *may* be different without impugning the affidavit of Smith in another; for if the note was originally made by Smith to Walker, upon an agreement with both them, and the *plaintiff's agent to elude* the state of usury, the whole transaction would be clearly void. In whatever point of view, therefore, I am capable of considering the case I am of opinion the certiorari should be retained and a trial de novo awarded.

Note —See *Eestes* v *Hairston*, 1 Dev. Rep. 354. *Collins* v *Nall*, 3 Dev. Rep. 224. *Erwin* v *Erwin*, Ibid, 528.

POTTS *vs.* LAZARUS—Page 83.

An action will not lie against a person who describes himself in the contract which he executes, as agent for another.

This was an action of covenant founded on a charter party entered into between the plaintiff, and the defendant, as agent for Paul Errill Lorent, of Charleston. The defendant is described as agent in every part where his name occurs, and he signs and seals it, also as agent. The question submitted to the court is, whether he is personally liable to the action.

The cause was submitted without argument.

SEAWELL, J. delivered the judgment of the Court.

The only question which can arise in this case is, who are the persons who are parties to this deed? In ascertaining this, it is the duty of courts to look into the whole of the contract, with a view of discovering who were contemplated by the actors in the transaction, to be those persons on whom the responsibility was to rest. Whoever these these shall turn out to be, they, in law, are to be considered as the parties.

It was for a long while held that the technical mode of *singing* the instrument, was conclusive, and that, therefore, though in the body of the deed it should be clearly shewn who the parties were, yet if executed by the agent, without it was done in the name of the principal by his agent, that the agent becomes personally bound.

Modern decisions have, however, over-ruled this distinction, and have placed the responsibility upon what, by the plain terms of the contract, appeared to be the understanding of those concerned. The cases of *Unwin* v *Wolsely*, reported 1 Term. Rep. 674, and *Hodgeson* v *Dexter*, in 1 Cranch, 345, are decisive of this point. In each of those cases the defendant had executed the deed by signing his own name, without any representative character, and affixing his

seal: in the present case the defendant expressly signs as "agent for Lorent," so that if any thing could be inferred from the manner of singing, this is stronger than those which have been decided. It is no answer for the plaintiffs to say that unless the defendant be bound no one will; for both the cases cited furnished that answer also. From whose fault has this difficulty arisen? Suppose the deed had been executed "P. E. Lorent, by A. Lazarus his attorney;" must not the plaintiffs then shew that Lazarus was authorised before Lorent would be responsible? The same result follows in both cases. Therefore, as the whole of this deed, from the beginning to the end, expressly states the contract to be made by Lazarus, not in his individual capacity, but as representing P. E. Lorent, we are of opinion that he is not personally bound, and that, therefore, the rule for new trial should be discharged.

NOTE.—See next case of *United States* v *Blount;* also, *Delius* v *Cawthorn*, 2 Dev. Rep. 90. *Redman* v *Coffin*, 2 Dev. Eq. Rep. 441. *Oliver* v *Dix*, 1 Dev. & Bat. Eq. Rep. 150. *Hite* v *Goodman*, Ibid, 364.

THE UNITED STATES *vs.* BLOUNT—Page 84.

An action may be sustained in the name of the United States, on a covenant made in their behalf by a public officer, and their special agent *quoad hoc*, although such agent do not sign and seal the contract in their name.

This was an action of covenant on a deed which is in the words and figures following, viz. "Covenant and agreement made and entered into this 13th day of November, A. D. 1800, by and between John Wallace of Shell Castle, in the county of Carteret, and John Gray Blount of the town of Washington and county of Beaufort, of the one part, and James Taylor, Surveyor of the port of Beacon Island, and, in this instance, special agent for and on the part of the United States, of the other part, witnesseth, that for and in con-

sideration of the sum of two thousand eight hundred dollars paid by him, the said James Taylor, for the United States to him, the said John Wallace, the receipt whereof is hereby acknowledged, they the said John Wallace and John Gray Blount have sold to him, the said James Taylor, for the United States, eighty thousand bushels of shells for the works intended to be erected at Beacon Island; which shells the said James Taylor, or his successor, or any and every person appointed by him or by the United States may take at any time, or all times, until the same be fully completed, from the following places: Forty thousand bushels, or one half of the quantity now sold, to be taken from the rocks adjacent and contiguous to Beacon Island and Shell Castle, as he may choose, and forty thousand bushels, or the other moiety, to be taken from Shell Island; the quantities taken to be ascertained by the usual mode of measuring shells, or by any other which the said parties may hereafter agree on to facilitate and expedite the delivery.

"It is further covenanted and agreed upon by and between the said parties, that the said James Taylor may add to, or diminish from the said quantity, to wit, eighty thousand bushels, as he or his successor may hereafter think proper or find convenient; and should he add to the quantity, it is hereby covenanted that he shall have any further or larger quantity at the same prices with those now sold to him, which are three cents for the shells taken from Shell Island, and four cents for the shells taken from the rocks per statute bushel measured as customary: and in the event of his not taking the whole quantity now covenated for, the said John Wallace and John Gray Blount are hereby bound to repay him at the rates aforesaid for such quantity so not taken.

"And the said John Wallace and John Gray Blount further covenant and agree to and with the said James Taylor, that should any let, hindrance, or molestation, prevent him, the said Jams Taylor, or his successor, or any person acting by or under their authority, or by virtue of this covenant, from taking the quantity or any part thereof from Shell Island, now covenanted for, by reason of any claim made or to

be made to the said Island, then and in such case, the said James Taylor or his successor may make up the quantity so deficient in consequence of such hindrance, from the rocks adjacent and contiguous to Shell Castle and Beacon Island aforesaid at the rate of four cents per bushel as foresaid; and the said John Wallace and John G. Blount bind themselves by these presents to defend any and every action or actions, suit or suits, which may be brought against him or his successor, or any other person acting by or under their authority, or by virtue of this covenant. In witness whereof, the parties aforesaid have hereunto set their hands and affixed their seals, and have interchangeably agreed upon the said covenant.

And the said United States say that they did not take the whole quantity of shells aforesaid, to wit, eighty thousand bushels; and that in fact, they did only receive five thousand bushels parcel thereof, to wit—2500 bushels from the rocks adjacent to Beacon Island and Shell Castle, and 2500 bushels from Shell Island; and as to the residue, to wit, 75000 bushels, they did refuse to take the same, to wit, on the 10th June, 1802, of which the said Blount then had notice: And that they, the said United States, on the said 10th June, 1802, demanded of the said Blount repayment for the quantity so not taken, which he refused, &c.——Damages, £5000.

And the defendant demurs, and shews as the cause of demurrer, that the United States are not a party to the said indenture, and cannot maintain any action thereon, in their own name.

Donnell, in support of the demurrer. This action cannot be supported in the name of the United States. The rule is, that where a deed is made *inter partes*, a stranger shall not take advantage of a covenant made for his benefit. 3 Lvintz. 139. Nor where a bond is made to A for the benefit of B. can the latter sue upon it, or release it, because he is not a party. Levintz. 235. 2 Inst. 673. In Carthew 76, it was held by Lord Holt, that a party to a deed cannot covenant with one who is no party to it; but that one who is

no party to a deed may covenant with one who is a party, and oblige himself by sealing the deed. The parties in this case are *Blount* and *Wallace* on the one side, and *Taylor* on the other. If the latter as agent of the United States, could communicate to them a power of enforcing this covenant, he could only do it by making them a party by signing and sealing in their name. If a person having a power of attorney to act for another, make a lease in his own name, such lease is void, for it should be made in the name of him who gave the power and commission to act in his behalf. 9 Rep. Combe's case. 2 L. Raymond 1418. If the covenant is badly framed and imperfectly executed, it is the fault of those who framed it; and, as the Chief Justice remarks, in 1 Bos. & Pull. 98, the court can look no further.

Mordecai, for the plaintiffs. If the United States cannot sue on this covenant, no person can; and the effect will be to give the defendant a large sum without any consideration. Taylor could not maintain the action, for then his private debts might be set off against a just claim of the U. States; nor could he be liable to an action, for it appears manifestly throughout the whole deed, that the defendants did not contract with him on his personal responsibility, but as agent of the United States. This principle seems to be conclusively settled in the cases of *Macbeath* v *Holdimand*, 1 Term Rep. 172, *Unwin v Wolseley*. Ibid 674, and *Hodgton* v *Dexter*, 1 Cranch 345. In the second case it is remarked by Ashurst, J. that whether the contract be by parol or by deed, it makes no difference as to the construction to be put upon it. Whatever may be the effect of a seal between private persons, it cannot be necessary that the seal of the United States should be affixed to every contract made for their benefit, in order to make them parties. Their agents are numerous and dispersed over a great extent of country, but they have but one seal, which is in the care of one officer. The true construction of this covenant is, that the benefit of it is to enure to the United States, and the agent having put a seal to it, cannot change the intent of the parties. If B. in consideration of his having leased land

from A, promise to pay the rent to C, the latter may maintain an action. 3 Bos. & Pull. 149. So if one person make a promise to another for the benefit of a third, that third may maintain an action upon it. 1 Bos. & Pull. 101.

Donnell, in reply. It is not necessary for me to prove that the action might have been brought by Taylor; for it does not follow that the United States may sue because he cannot. The benefit of a contract may enure to a party without his having a right to maintain the action, as in the case from 1 Levintz. to which may be added 7 East, 148. But if a man covenant under his hand and seal, for the act of another, he shall be personally bound by his covenant, though he describe himself as covenanting in behalf of another. 5 East, 148.

Taylor, C. J. The principle which has been so fully illustrated by the defendant's counsel is doubless a correct one, and is well established by the authorities cited. But whether a deed be made between parties, and who the parties are, must depend on a proper construction of the deed; and when we have once ascertained who the parties are, it follows that a stranger cannot sue on a covenant contained in it, thought made for his benefit. The United States cannot be considered as strangers to this deed, because they are formally, as well as substantially, made parties to it; formally, since it is made by the defendants of the one part, and a public officer, a special agent for the United States, of she other part; substantially, because it relates altogether to the carrying on of a public work, in which the agent as an individual cannot possibly have a personal interest. Indeed the observations made by the court in the case of *Potts* v *Lazarus*, decided at the present term apply fully to this case; for if Lazarus was not a party to that deed, the reasons leading to that conclusion must also prove that the United States are a party to the deed in question. As to an agent's liability to be sued, the case of a public agent is stronger than that of a mere private one, because the former is never held liable where it appears that he contracted on the behalf of government; though cases have occurred in which a private agent has been held liable to an ac-

tion, in consequence of the peculiar and express terms of the contract he has entered into. We are of opinion that the demurrer must be overruled.

NOTE.—See *Stanly* v *Hawkins*, 1 Martin's Rep. 55. *Potts* v *Lazrus*, ante, 83. *Hite* v *Goodman*, 1 Dev. & Bat. Eq. Rep. 364.

McMILLAN *vs.* HAFLEY—Page 89.

The plaintiff in an action of trespass *quare clausum fregit* must show that when the trespass was committed, he had either actual or constructive possession of the land. Therefore where the plaintiff had purchaaed the land at an execution sale in November 1805, but did not obtain a deed from the sheriff till July, 1805, and in the intermediate time, to wit, the 10th February, 1805, the defendant committed the trespass, claiming under the defendant in the execution, *it was held* that the action could not be maintained.

Constructive possession exists only when the party claiming his title to the land, and there is no one in actual possession, claiming under an adverse title.

The plaintiff became purchaser of a tract of land sold by the sheriff, under execution, on the 10th November, 1804, but the conveyance was not made until the 18th July, 1805. In the intermediate time, viz. on the 10th February, 1805, the defendant committed the trespass for which the suit is brought.

The execution issued from an order of the county court, directing Bolin, the prosecutor in an indictment, to pay the costs on the defendant being acquitted. After the order, and before the sale, Bolin conveyed for a valuable consideration to the defendant Hafley.

Two questions were presented to this court.

1. Whether the order was such a judgment as warranted the issuing an execution to sell Bolin's land?

2. Whether under the circumstances above stated, the plaintiff can maintain trespass?

CAMERON, J. delivered the judgment of the court.

The plaintiff in an action of trespass, *quare clausum fregit*, must shew that at the time of the commission of the trespass, he had possession of the premises, either actually, or constructively.

It is admitted in the statement of the case, that the plaintiff had not the actual possession of the land in question.

Constructive possession can only exist where the party claiming has title to the land, and there is no one in actual possession, claiming under an adverse title; and as the plaintiff had no title at law, at the time of the commission of the trespass, he cannot be consdered as having a constructive possession—consequently, he cannot recover in this action.

The opinion of the court being in favor of the defendant, on the second point stated in the case, it is unnecessary to decide the first point.

Let the verdict for the plaintiff be set aside and a nonsuit entered.

Note—See *Kennedy* v *Wheatly*, 2 Hay. Rep. 402. *Graham* v *Houston*, 4 Dev. Rep. 232. *Dobbs* v *Gullidge*,, 4 Dev. & Bat. Rep. 68. *Phelps* v *Blount*, 2 Dev. Rep. 177. *Sikes* v *Basnight*, 2 Dev. & Bat. Rep. 157. See also note to *Strudwick v Shaw*, 1 Martin's Rep. 34. S. C. 1 Hay. Rep. 5.

STATE *vs.* TREXLER—Page 90.

When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all, who concur are guilty, though they were not privy to the first or the intermediate acts.

The snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery.

Where the prosecutor accidentally in the presence of the prisoner, dropped some papers out of his pocket book, among others a bank note of $100, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued between the prosecutor and the prisoner for the possession of the note, which resulted in the prisoner's retaining possession and running off with the note, *it was held* that, as the bank note not the subject of larceny, it was a forcible trespass.

The defendant had been tried and found guilty on an indictment for a trespass in taking from *Hughes*, the prosecutor, a bank note of $100. On a motion for a new trial, it was agreed that this court should decide whether the facts alleged in the following affidavit of *Hughes*, the prosecutor, constitute an indictable trespass or not, and a new trial to be awarded or refused accordingly.

AFFIDAVIT.

"On the 5th day of June, in the year 1809, this deponent was walking on the pavemant near John Trexler's house in the town of Salisbury, and stopped at Trexler's door to inquire of him how the frame of Mull's house went together at the raising, at which time Trexler invited deponent into his house. After some conversation, deponent asked Trexter to go to Pinkston's Tavern, which was the adjoining house, to drink some grog, which he declined, whereupon deponent went to Pinkston's himself, and after being there a short time returned to Trexler's house and found Trexler lying on the bed. It was about eleven o'clock in the forenoon. Upon being invited to sit, deponent took a chair and sat upon it near the foot of the bed, on which Trexler then lay. Trexler asked deponent how he came on with his af-

fairs, which were then in a critical situation, to which deponent replied, "*bad enough*," but he was then preparing to go to Virginia for the purpose of collecting a judgment due to him there, which, he hoped, would enable him to prosecute his business with greater advantage. Deponent further stated, that he was then going to Mr. Evan Alexander's to settle with him, and receive a balance due, at which Trexler expressed some surprise that Mr. Alexander should be in deponent's debt, and that he should have delayed payment so long. Deponent said that Trexler need not be surprized at it, and drew out his pocket-book to show him a statement of the account; in doing which, some papers which had been in the pocket-book, fell upon the floor. Deponent then laid his pocket-book, with the remainder of the papers, on the foot of the bed, and turned round to pick up those which had fallen. In the mean time Trexler changed his position on the bed, and lay with his head towards the foot of the bed, as deponent thought, for the purpose of being more conveniently situated to see the papers. As he then lay, the pocket book and papers were immediately before him. While deponent was picking up the papers from the floor, Trexler said he thought that deponent was very careless with his papers;—deponent replied, yes, and looking round observed Trexler, in a secret way, opening a note of the Bank of the United States for one hundred dollars which deponent had carefully placed in the pocket book that morning, for the purpose of having it changed for the other money. In attempting to take the bank note out of Trexler's hands, the bank note was fully opened, and Trexler clenched his hand upon it, and refused to give it up, saying that he would not give it up unless deponent would tell him what it was. Deponent at first, observed, that it was no business of his what it was; but that it was money, and putting up the pocket-book and papers, finding Trexler still refusing to give up the bank note, deponent jumped upon him as he lay on the bed, to endeavor to force it from him. After struggling with him for some time, deponent told Trexler that he would spoil the bill, upon which he said, if deponent would

let him get up, he would return it. As soon as deponent permitted him to rise from the bed, Trexler attempted to make his escape from the room in which he then was, to another room. Deponent seized him a second time, and endeavored partly by force and partly by intercession, to induce him to return it; Trexler still refusing to return it, and at the same time insisting that deponent should tell him what it was—upon which deponent at length said, "*to be plain with you John, it is a bank note of one hundred dollars.*" As soon as deponent had made this declaration, Trexler whooped and made a great noise, said it was more; and swore he would not take five hundred dollars for it. Trexler then make his escape into another room where there was a desk, and while deponent was struggling with him at the desk, he took out of the desk a red Morocco pocket book, after which the bank note disappeared, and deponent has never seen it since to his knowledge. In a few minutes afterwards, when deponent remonstrated with Trexler concerning such conduct, he (Trexler) said, if it was deponent's bill, Trexler's daughter had found it in the garden. At another time Trexler told deponent, that one of his journeymen (Dillon) had found it and given it to his daughter,—all which assertions deponent positively contradicted, and said they were false. Trexler afterwards, in the same day, agreed that he would go with deponent to Peter Brown's store, and if he would say that deponent had had such a bill, that he (Trexler) would return it. At the time appointed, he failed to attend. About two days afterwards, deponent met Trexler in the street and again demanded the bank note, upon which Trexler asked deponent if he would swear to the bill, which dependent said he would do, and would also prove it by Peter Brown, now deceased. When deponent urged him to go before a Magistrate for the purpose, Trexler equivocated and asked deponent if he knew the number of the bill, and some other questions of a similar nature; but declined going to a Magistrate as deponent requested. The conversation at this time ended by Trexler's saying, that deponent never would get the bank note in question, without

he could get it by law. Deponent told him then, that he would immediately employ Mr. Henderson to obtain redress by law, and turned away; upon which Trexler said that if deponent wanted a horse, he would give him his bay horse worth seventy dollars, and thirty dollars in silver, for the bank note. Deponent refused to accept this offer, and immediately employed counsel to prosecute him. Next day Trexler came to deponent and offered to return a Cape Fear bank note of one dollar, and said that was the note he had taken from deponent; upon which deponent had him taken with a state warrant—and further, saith not."

SEAWELL, J. delivered the judgment of the court.

It has been argued by the prisoner's counsel, that an indictment for a trespass will not lie, on the facts set forth in this case; owing, as it is alleged, to the want of an *actual* breach of the peace—The bank note being taken from the pocket book *privily*, whilst the prosecutor was collecting the papers which had fallen—and that if any offence was committed, it was larceny: and even if the court should be of opinion, actual force *was* employed; yet, it would then be robbery, and in both instances the trespass be merged in the felony.

As to the latter argument, we find no difficulty in disposing of it. The bank note not being a subject of larceny, no felony could be committed to extinguish the trespass. And as to the first, we all agree, that if the prosecutor, upon discovering the note in prisoner's hands, had only *demanded* it, and the transaction had there *broken up*, the refusal to deliver, and the subsequent detention, could not have, nor does it have, any influence upon the case, so as to make the *first* taking forcible; for though it is true the prisoner had then committed a complete felony (supposing the note a proper subject;) yet as the transaction did not then break up, but was continued by the prosecutor at the same instant seizing the prisoner, who then had the note, which continued in *sight* and which had never been out of *reach*, it was to every substantial purpose *reduced* to possession; and the prosecutor being then overcome by the prisoner, in the scuffle, the carrying off the note constituted the *actual* asportation: For

where there is one *continuing* transaction, though there be several distinct asportations in *law*, yet the party may be indicted for the *final* carrying away, and all who concur are guilty, though they were not privy to the first, or intermediate acts. The case of *King* v *Dyer and Dister* which is cited 2 *East's Crown Law* 767, was, where Dyer, the master of a boat, was employed to bring on shore a quantity of barilla, and Dister and others were employed as laborers to remove the barilla after it was landed, to Hawkin's warehouse; that while the barilla was in the boat, some part of it was separated from the rest and concealed in another part of the boat, without the privity of Dyer; that afterwards Dyer and Dister and the others, who had removed and concealed it, carried it off, and though a complete *legal* taking and carrying away was performed before Dyer had any agency or knowledge, yet as he joined in the *final actual* asportation, he was held guilty and convicted. To the same effect is the case of the *King* v *Atwell & O'Donnell & als*, cited in the same book. Suppose a thief should privately take money from one pocket and place it an another for the convenience of handing it at a suitable time to his comrade, and when he attempted to take it out again, the owner should seize his hand, upon which a scuffle takes place and the owner is overpowered or awed to desist, and the thief goes off with the money? This, surely, would be robbery—in the present case, the prisoner being seized before the note was even out of the prosecutor's *presence*, and being then in reach, was as much in his possession as the pocket-book he had laid down. Had the prosecutor caught hold of the bill and then been overcome or intimidated, it would have been robberry; and if an actual touching of the note be essential to the regaining possession, (which I, for my own part, by no means think necessary) the jury had ample room to presume it from the circumstances, and should have been so instructed. The snatching any thing unawares, is not considered a taking *by force;* but if there be a *struggle to keep it*, or any violence done the person, as in Lapier's case of the tearing the ear, the taking is a robbery. *Buller Justice in*

Rex v *Horner* cited in Leach's Crown Law, in a note to Baker's case. This distinction steers clear of the cases cited in Hawkins and Hale of a stealing of the purse privily, and upon the owner's discovering it in the hands of the thief, *demanding* it, when the thief threatened to pull his house from over his head if he said any thing about it, and rode off, which was held to be no robbery: It is also to be remarked, that at that period, the prevailing opinion seemed to be, that a taking to constitute robbery must be *through fear.* Wherefore, we are all of opinion, the jury did right in finding the prisoner guilty; that it was a rank trespass, and the rule for a new trial should be discharged. It would be a reproach to the law to consider the taking a hat which a frighted man had let fall accidentally from his head, a robbery, the lifting of a sash, a *breaking of a house,* so as in both instances to constitute capital offences, and not to consider the present, a taking by violence, when the final carrying away was by the dint of strength.

NOTE—Upon the subject of an indictable trespass to personal property, see *State* v *Flowers*, 2 Murph. Rep. 225. *State* v *McDowell*, 1 Hawks 449. *State* v *Mills*, 2 Dev. Rep. 420. *State* v *Love*, 2 Dev. & Bat. Rep. 267. *State* v *Bennett*, 4 Dev. & Bat. Rep. 43. *State* v *Hemphill*, Ibid 109.

JOHNSTON & WIFE *vs.* HAMBLET—Page 96.

Where the wife on the day of her marriage but before its solemnization, conveys slaves to her mother, the husband cannot, after the marriage, recover them back in right of his wife, although the conveyance was made without his knowledge or consent.

Detinue for several slaves which the plaintiff Elizabeth owned and possessed before her intermarriage with Johnston. On the day of her marriage, and before its solemnization, she made a bill of sale to her mother of the negroes in question, without the knowledge or consent of her in-

tended husband; and the question submitted to this court was, whether the plaintiffs are estopped by that deed from maintaining this action.

Nash, for the plaintiff, insisted that the deed being manifestly in fraud of the marital rights, was essentially void, not only against the husband, but also against the wife, who might have set it aside in a court of equity. It would have been no objection there, that the party seeking relief was a *particeps criminis*; for then there would be no redress at all against the fraud, and no body to ask it. 1 Vern. 340. 2 Vern. 466. 1 P. Williams 496. The deed having then no operation, cannot amount to an estoppel against the party making it, or others claiming through him. A court of law has concurrent jurisdiction on this subject with a court of equity. 3 Wils. 349. 1 Burr. 396.

Norwood, for the defendant.—The wife cannot claim in this court against her own solemn deed, and the husband deriving his title from her, cannot have a better one than she had. If the plaintiff can make out a case proper for a court of equity, redress may be had there, the fraud charged being of that species which peculiarly belongs to that jurisdiction. Both by the common law and the statutes of fraud, fraudulent deeds, though void against others, are good as between the parties, and especially against the alienor.

Per Curiam. If the wife had continued sole and brought this action, she must have been barred by her deed. As the husband brings the action in right of his wife, he can depend only upon such legal right as she had, and cannot, in this court at least, claim against her deed.

Let a nonsuit be entered.

Note.—See acc. *Logan* v *Simmons*, 1 Dev. & Bat. Rep. 13.

PAYNE *vs.* HUBBARD—Page 97.

An equitable right in land cannot be sold under an execution at law.

The defendant had purchased, before the year 1777, an improvement on a tract of vacant land, and in 1778 duly made an entry. He was drafted before the 17th April, 1780, to serve in the militia, which he failed to do, or to find a substitute; and being delinquent, on the 24th June following, a warrant was on that day issued by the Colonel of the county, and directed to the deputy sheriff, commanding him to sell so much of the defendant's property as would make the sum of £3,500. This warrant was issued under the 2d section of an act, passed on the 17th April, 1780. The deputy sheriff levied upon the entry above mentioned, and sold it publicly to Daniel Mitchell, who sold it to the complainant's father, who had the land surveyed and procured a grant to issue for it on the 18th August, 1787, in the name of the defendant. The sheriff afterwards in 1789, executed a deed to Payne, in completion of the sale by his deputy. The bill prayed a conveyance of the land, or a repayment of the purchase money.

Nash, for the defendant, stated several objections to the complainant's recovery.

1. That the entry being a mere *chose in action*, was not liable to execution, 1 Cruise 459. 1 Bl. Rep. 170. 1 Saunders 108.

2. The unconstitutionality of the act of 1780, under which the warrant was issued. 2 Haywood's Rep. and Mr. Justice Patterson's opinion in the *Wyoming* cause.

3. That the warrant was directed to the deputy sheriff, whereas by the act it should have been directed to the high sheriff. 1 Wils. 155. 1 Vesey 195. Yelv. 175.

4. When the land was sold by the sheriff, he could not convey any title, because Hubbard himself was incapable of doing so. Act of 1777, Cap. 33, sec. 7.

Norwood, for the complainant, cited on the first point, Shepherd's Touchstone 501. 1 Saund. 56, 172, 45. 1 Brown 81. Finch 202. 3 Atkyns 309. On the second, Vattel, B. 1, Sec. 1, 2, Cap. 20, Sec. 244.

Per Curiam. It is unnecessary to decide all the questions raised in this case, because we are satisfied that the law was correctly laid down in the case of *Allison* v *Kirkland & alias*, in this court. It then follows, that Mitchell acquired no legal title to the land under the purchase made by him at the sheriff's sale, because Hubbard himself had none. The latter purchased an improvement, which gave him only a right in preference to others, to obtain a legal title from the State, towards which he had advanced so far as to make an entry. But the legal title remained in the State at the time of entry, an equitable title alone subsisting in the defendant, and this we have held could not be sold by execution.

Wherefore, the bill must be dismissed.

Note:—The case of *Allison* v *Gregory*, 1 Murph. Rep. 333, decided that an equity of redemption could not be sold under an execution at law. But now it may under the act of 1812, (1 Rev. Stat. ch. 4, sec. 5.) Upon the construction of this act, see *Moore* v *Duffy*, 3 Hawks 578. *Harrison* v *Battle*, 1 Dev. Eq. Rep. 537. *Murdecai* v *Parker*, 3 Dev. Eq. Rep. 425. *Camp* v *Coxe*, 1 Dev. & Bat. Rep. 52. *Henderson* v *Hoke*, 1 Dev. & Bat. Eq. Rep. 119. *McKay* v *Williams*, Ibid 398. *Thorpe* v *Ricks*, Ibid 613.

KNOWIS ET ALII *vs.* BAKER ET ALII—Page 98.

Where a suit had been depending several terms, and one of the defendants married, her husband who was made a party, was permitted on sufficient affidavit, to remove the cause to another county for trial.

Since the last continuance of this cause Keziah Knowis, one of the defendants, intermarried with Hance Baker, who, at the Fall Term of 1814, was made a defendant, and there-

upon moved for a removal of the suit upon an affidavit, which stated in substance, that he did not believe he could have a fair and impartial trial in that county; that the subject of the suit had been much talked of, and improper impressions made as to his case, which would operate injuriously on the trial of the issues; that his wife, the party principally concerned, had resided at a distance from that county for some years, and only now became conusant of these facts, and the deponent avails himself of this first opportunity of procuring a removal.

The motion was overruled by LOWRIE, J. from whose decision the defendant appealed. The cause was here submitted, and the opinion of the court delivered by

CAMERON, J. It is essential to the due administration of justice, that the parties to a suit should have a proper degree of confidence in the integrity and impartiality of the jurors who are to pass on their rights.

We entertain no doubt but that the merits of this application come clearly within the just interpretation of the acts of assembly, authorising the courts to remove causes from one county to another for trial.

No neglect or delay in making the application, can be fairly imputed to the defendant; for although the suit has been depending for several terms, yet till he became interested in it, he had no authority to interfere in it: and the application for a removal is made at the same term at which he is made a party to the suit.

The defendant's wife living at a distance, and being ignorant of the existing impediments to a fair trial, ought not to be precluded (supposing her still unmarried) from applying for a removal of the cause.

Let the cause be sent back with directions that it be removed to some adjoining county for trial.

DOWD *vs.* MONTGOMERY ET ALII—Page 100.

Where by deed a negro slave was given "to J. C. and his heirs, for him and his wife to have the use of the said slave their natural lives; and at their death for said negro and increase, to be equally divided amongst their children, the said J. C. to use the said negro as his own property, not to sell her, but for his heirs to use and sell, at their own free will and pleasure," *it was held* that a proper construction of the deed gave to J. C. a legal estate for life in the slave with a legal remainder to his children which, being contrary to law, J. C. took an absolute interest in the slave.

This was a bill in equity calling upon the defendants to execute the trusts of a deed of gift for a female slave and her increase, in favor of the children of John Carraway, jun. from whom the complainant purchased. The defendants are purchasers from John Carraway, jun. and demurred to the bill for want of equity. The question depended solely upon the construction of the following deed: "I also give my said son John, one negro girl called Rachel, to have and to hold to the said John Carraway, jun. and his heirs, for him and his wife to have the use of the said negro girl their natural lives; and at their death for said negro and increase, if any, to be equally divided amongst their children, only for me and my wife to have the use of her during our lives, and for him, the said John Carraway, jun. to use the said negro as his own property, not to sell her, but for his heirs to use and sell, at their own free will and pleasure, without any hindrance, let, or molestation from me, my heirs, or any persons whatsoever.

The case was argued elaborately and with consumate ability, by *J. Williams*, for the complainant, and *Browne*, in support of the demurrer. The authorities cited by the former were designed to prove that a trust for the benefit of the children of John Carraway, jun. was created by the deed. The position maintained on the other side was, that the deed was nothing more than a common law transfer.

SEAWELL, J. delivered the judgment of the court.

The question which presents itself on this demurrer, is, whether the limitation in the deed to the *children* of John Carraway the younger, can be sustained? And this leads us to enquire, what were the nature of the estates John the younger and his children severally were to take under the limitations in this deed?

As to the estate given to John, it has been properly admitted, throughout the argument, to have been purely legal; whilst it has been insisted on, that on his death this same estate became vested in his *heirs*, who were bound to *make* division amongst the *children*: and that nothing is limited to the children but an *use*—and the order in which "heirs" and "children" stand in the deed, has been relied on as evidence of this intention.

If it were not for a succeeding part of the deed, there might be force in the argument; but that part, by way of specifying the interest which the several parties were to derive, explicitly states, "that the said John Carraway, jun. is to use the said slave as his own property, not to sell her, but for his heirs to use, sell, &c. without any hindrance, &c. from my heirs, or any persons whatsoever." It is then evident, that the maker of the deed, intended by "heirs," *children*; and as he must be understood so, in this part of the deed, it furnishes at least an answer to the argument insisted on.

The last limitation is then precisely of the same nature with the first. The *property* itself is wholly given to the children, under the appellation of "heirs," who are to dispose of it as they please, without any accountability; which can only be done by a *legal* owner. The deed then, contemplates the passing two legal estates, one to succeed the other; and is nothing less than the gift of chattels to John Carraway, jun. for life,—remainder to his children. This the *law* has forbidden, the last limitation being contrary to law.

The demurrer must be sustained and the bill dismissed with costs.

NOTE.—See acc. the cases referred to in the note to *Simms* v *Potter*. 1 Martin's Rep. 22. Such limitations of slaves are now allowed by act of Assembly. I Rev. Stat. ch, 37, sec. 22.

M'FARLAND *vs.* SHAW—Page 102.

In an action by a father for the seduction of his daughter, her examination taken before two magistrates for the purpose of charging the putative father with the maintenance of the child under the act of 1741 (1 Rev. Stat. ch. 12, sec. 1) is not admissible evidence against the defendant to prove the fact of seduction.

In an action by a father for the seduction of his daughter, he may give in evidence the dying declarations of the daughter charging the defendant with having been her seducer.

This was an action on the case for debauching the plaintiff's daughter, and for the trouble, expenses and loss of service, incident thereupon.

To prove that the defendant did debauch and get the plaintiff's daughter with child, the plaintiff's counsel first offered the examination of the daughter, Catharine McFarland, deceased, which was taken before two magistrates, wherein she charged the defendant with having been the father of a child with which she was then pregnant, in order to charge the defendant with the maintenance of said child, according to the act of assembly. Objections were made to this testimony; and the presiding Judge decided it to be inadmissible. The plaintiff then offered to prove the declarations of the daughter, in her last illness and made in view and expectation of death. To this evidence, also, the defendant objected; but the objection was overruled.

The plaintiff then proved that the daughter was sick in childbed for about ten days, at his house, which was her usual place of residence—that three medical gentlemen were called to her, two of whom attended her together, and the other some time afterwards—that several times during that illness, she declared that the defendant was the father of the child with which she was then pregnant; and that after all hope of life was gone, she desired that defendant might be sent for, and upon being informed that he would not see her, exclaimed, "I am going—he will soon go too—where he

will be obliged to see me and will not dare to deny the truth." Upon this evidence, the jury found for the plaintiff.

1. If the said examination of the daughter was admissible in evidence, then the verdict to stand :

2. If neither the examination, nor the declarations of the daughter which were received, should be deemed admissible, then the verdict to be set aside and a new trial granted

Strong, for the plaintiff.—The examination of the woman ought to have been admitted as evidence against the defendant. The act of Assembly is positive, that it shall be conclusive evidence to charge him as the father; and that is the fact now in contest between these parties. The examination and the consequent judgment formed a judicial act, done by persons having a competent authority, in a case too where the defendant was a party. But if this point should be ruled against us, we contend,

2. That the dying declarations of the daughter were properly received. It is unnecessary to cite authorities to prove the uniformity with which such evidence is received in criminal cases. The same motive which led to it's propriety there, is equally forcible here, necessity; because the fact can alone be proved by the daughter. There is, however, an authority for its admission in civil cases, in 3 *Burr.* 1255, where the dying declarations of *Medlicott* were received to prove his having forged a will.

McMillan, for the defendant.—The only case which gives any countenance to the competency of the examination, is that of *Rex* v *Eriswell.* 3 Term 307; but the opinion of two Judges in that case was overrulled, in 2 *East* 54. It is entitled to no higher respect than hearsay evidence, which is received only in certain excepted cases, probably as old as the rule itself. The correct principle is, that, except in cases of felony, and that by statute, informations or examinations of witnesses, taken before magistrates, in the absence of the party charged, cannot be admitted as evidence, either at common law, or by statute. 1 *McNally* 313.

It is not established as an exception to the rule of evidence in civil cases, that the dying declarations of a witness are

admissible. In the case cited from *Burrows*, the declarations of *Medlicott* were received only to invalidate the effect of his signature to the will.

Strong, in reply.—The point decided in *Burrows* is, that a subscribing witness to a will, acknowledged upon his death-bed, to the person giving the evidence, that he, the subscribing witness, did himself forge it ; and this was held proper testimony. It is then a substantive ground of evidence.

Taylor, C. J. This action is brought by the father, for an injury done to him, by the loss of his daughter's service, in consequence of her seduction by the defendant, and incidental illness. The examination of the daughter before the magistrates, is made evidence against the putative father, solely for the purpose of charging him with the maintenance of the child ; and so far it is conclusive evidence, because he can adduce no evidence to repeal it's force, or exonerate himself from the burthen. To that single object the act of 1741, expressly confines it, and the court cannot give it a greater extent, without subverting every principle of just construction, established in relation to staute, altering the common law, as well as violating the spirit and policy of the general law of evidence; for the act neither requires the putative father to be summoned, nor furnishes him with the means of having the benefit of a cross-examination. It is a question between the county and the father, who shall bear the charge of the child, and in receiving the examination for that purpose, the letter and spirit of the law are obeyed : but if it be received for any other purpose, we must wander from both, and in so doing, offer violence to the common law and inflict a wound upon private rights. Shall such examination be conclusive evidence against the father, in an action constituted as this is, between him and the injured parent, when if the daughter had negatived his being the father, it could not have been received in his favor? The very statement of the proposition furnishes the answer. In both cases it is *res inter alios acta*, and cannot on either side be, be admitted for the purposes of this action.

2. The declaration made by the daughter, during her last illness, and under the apprehension of approaching death, was accompanied with an impressive solemnity—a forcible appeal to every honest mind—a pathetic claim to confidence from the best feelings of the heart, as well as the most austere duties of the judgment, that seem to entitle it to as much consideration as any such evidence has hitherto received.

In cases where life is at stake, such evidence is uniformly received and credited, and numerous are the victims to its authority, recorded in the mournful annals of human depravity. Can the practice of receiving it to destroy life, and rejecting it where a compensation is sought for a civil injury, derive any sanction from reason, justice, or analogy? And though no direct precedent may exist to guide the court, yet it must be recollected that the law consists of principles, which precedents only tend to illustrate and confirm. In *Woodcok's* case the dying declarations were received, although the party wounded had not expressed any apprehensions of dying; because he had received a mortal wound, and his situation was such as would naturally preclude all temptation to falsehood. The case before us is stronger, for the woman believed she was dying and so expressed herself. It is also a circumstance in this case, upon which we chiefly ground ourselves, that the fact disclosed in her declaration could only be proved by herself; she was the injured party through whom the cause of action has arisen to the father. We give no opinion how far the dying declarations of an indifferent person, not receiving any injury, and not a party to the transaction, would be evidence in a civil case. Our decision is confined to the state of facts presented in this case; and in that we think the verdict has been properly found and ought not to be disturbed.

HAYWOOD *vs.* COMAN AND H. HUNTER'S ADM'RS.—Page 106.

Where a bill in equity is served upon a party, who neglects to answer, and the bill is taken *pro confesso* and the cause set for hearing, after which he dies, his administrator may be allowed to answer upon affidavit made, that the intestate, for a considerable time before his death, was reduced to such a state of mental debility, as unfitted him for business. But it was also ordered that the complainant should have the benefit of the depositions, taken without notice, while the judgment *pro confesso* was in force.

This was a petition on the equity side of the court, to set aside an interlocutory order, made at April term, 1813, whereby the administrators of *H. Hunter* were allowed to file their answer to the complainant's bill of complaint. The bill was served on the intestate. who neglected to answer, and the cause was set for hearing in his lifetime, at April term, 1810, after which he died, and his adminstrators were made parties at April term, 1811, before which time the complainant had completed his depositions, with notice to the other defendant, *Coman*, but without any to *Hunter*. At the term when the admistrators were made parties, they offered to file their answer, but were not allowed to do so by the court. At the before mentioned term of April, 1813, the motion to file their answers was again renewed, and allowed by the court; and this is the oder complained of. The defendants in their answers, state, the intestate, for a considerable time previous to his death, was reduced by intemperance to such a state of mental and corporeal debility, as unfitted him for business.

By the Court.—The facts disclosed in the answer of the administrators of Hunter, were sufficient to warrant the court below in setting aside the order (entered according to the usual practice) for taking judgment *pro confesso* against him; and receiving their answer. The complainant's petition, praying a reversal of that order, and that the answer of the administrators be suppressed, is disallowed and dismissed.

Justice to the complainant, however, requires, that he should have the benefit of the testimony taken without notice to Hunter, while the judgment *pro confesso* was in force against him—as during that period, the complainant was under no legal obligation to give notice to him of the time and place of taking his depositions.

Let the cause be remanded with the following order and directions to the court below, viz: that the answer of the defendants, administrators of Henry Hunter, stand according to the order made for receiving it—that the complainant have the benefit of the testimony taken without notice to Hunter, in his lifetime saving all just exceptions thereto.

TINNEN *vs.* ALLISON—Page 107.

Where the articles of a horse race specify the sum bet, but say nothing as to the time of payment, the money is payable on the day of the race and must then be staked.

This was an action of covenant founded upon articles of a race, entered into between the plaintiff and defendant, in the following words, to wit:

"Articles of a race, made this the 3d day of October, 1809, between Robert Tinnen, of the one part, and Joseph Allison, of the other, witnesseth, the said Tinnen runs his stud horse, known by the name of Solon, against Joseph Allison's stud horse, Grey Medley, *alias*, Palafox, for the sum of two hundred dollars, carrying one hundred and sixty on each horse; the said race to be run on the paths known by the name of Bason's paths, and on the 21st day of November next, as witness, our hands and seals, this day and year above written."

Upon the trial, the counsel for the defendant insisted that the plaintiff was bound to shew that the money was staked, and the court being of that opinion, the plaintiff suffered a non-suit.

SEAWELL, J., delivered the opinion of the court.

The plaintiff has brought an action to recover from defendant for an alleged breach of contract on his part, and it is necessary the plaintiff should show that *he* has been guilty of no default. The articles on which the suit is brought, stipulate that a race is to be run at a particular day and place, between two horses, for two hundred dollars—they, therefore, do not contemplate that either is to trust the other; for no day being named for payment, *that* day is to be understood; and the winner, according to the import of the articles, would be immediately entitled to receive the money, which he could not obtain unless the loser had it to pay—and he who sues for a violation must shew he was ready and prepared to do every thing requisite on his part.

Wherefore, we are of opinion the rule for a new trial should be discharged.

CAMERON, being of counsel for plaintiff, gave no opinion.

NOTE.—See *Jackson* v *Anderson*, 1 Murph. Rep. 137 By the act of 1810 (1 Rev. Stat. ch. 51) all bets, &c. upon horse racing are made void.

WARD *vs.* GREEN'S ADM'RS—Page 108.

A a presumption in law arises from the payment of the last instalment upon a bond, that the preceding ones have been paid, provided it has been made in the manner and at the time contemplated by the parties; If otherwise, it is a presumption that the parties are acting under a new agreement.

On the trial of this cause, the following facts appeared in evidence: At January term of Onslow county court, in the year 1783, Richard Ward obtained a judgment against Samuel Green for the sum of £500. The action in the county court was commenced on the following instrument, viz.

"I promise to pay Richard Ward, or order, the just and full quantity of seven hundred and twenty-five bushels of

good merchantable boiled salt, to be delivered as follows, viz. 125 bushels on the 15th of September next, 125 on 15th October, 125 on 15th November, 125 on 15th December, 125 on 15th February, 100 on 15th of May next. In case of default of payment of the aforesaid salt, I do dereby promise to pay, or cause to be paid, said Richard Ward, twenty shillings in gold or silver for every single bushel of salt, as will amount to £725 in gold or silver, for value received, In case of default of payment of said money and salt, I do hereby empower Jas. Spiller, attorney at law, or any other practising attorney in this State, or elsewhere, to appear for me, at any subsequent court of law and confess judgment for said sum of money. All errors and misprision of errors excepted.

[*Signed*] SAMUEL GREEN."

August 8th, 1782.

Witness, &c.

Know all men by these present, that I the within named Samuel Green doth acknowledge myself fully indebted for the within mentioned different payments, to be punctually made at the time within mentioned, all and all the clauses and agreements of the within mentioned obligation; and in default of payment, I do hereby empower the within mentioned Jas. Spiller, Esq. or any other practising attorney, in any court of record in this State, in default of payment as within mentioned, to enter up judgment or judgments upon the bond or obligation; and I do hereby release my said attorney from all error that may happen in entering said judgment.

Given under my hand and seal, this 10th August, 1782.

[*Signed*] SAMUEL GREEN (Seal.)

On the back of said instrument are the following indorsements, viz: August 29th—then received first payment, which was 125 bushels of salt, in part of the within salt obligation. August 29th,—then received of Samuel Green 100 bushels of salt, in part of the within obligation, on the last payment. I say, received by Richard Jarratt.

Under the authority given in the instrument, judgment was entered up, without any writ having been served on the

defendant, Samuel Green; on the trial docket of Onslow County Court, January Term, 1783. The following entry was made in the suit :—"*R. Ward* v *S. Green*, viz. judgment confessed by warrant of attorney for 725 bushels of salt, with credit for 225 bushels, at 20s. per bushel £500." Execution issued against Samuel Green, returnable to October Term of Onslow County Court, 1785, and was levied on defendant's land. The judgment afterwards became dormant and *scire facias* issued to revive it, returnable to October Term, 1787, and was afterwards dismissed. In September, 1800, this action was commenced in the County Court of New Hanover, and in 1808, at February Term, the cause was tried, and the jury found the bond paid, from which the plaintiff appealed.

On the trial of the cause at this term, in pursuance of an agreement of former counsel, it was submitted to the jury whether the bond had been paid previous to the judgment in the County Court of Onslow? It was in evidence, that at the date of the judgment Samuel Green was considered insolvent, and that he contined so to be considered until his death.

His heirs inherit land from him and have it now in possession. When execution issued against defendant and was levied on his land, he never complained of the injustice of the judgment—That he was a man careless of his business. A witness who was present at the last payment endorsed upon the bond, stated the bond was not present, but it was agreed in consideration of a horse, that the sum should be credited on the bond. The jury found a verdict for the defendant.

Motion for a new trial upon the following grounds, viz.

1st. That the verdict is against the law and evidence of the case.

2nd. On the ground of surprise—the present counsel being ignorant of the agreement made by the former counsel, to try the cause on the merits of the bond; and, therefore, relying on the record of the judgment, were unprepared to shew that proceedings to revive the former judgment had

been continued from 1787 to 1799, which fact they would have shewn had they been aware of the grounds on which the cause was tried—which was not admitted.

SEAWELL, J. delivered the opinion of the court.

A presumption in law does arise from the payment of the last instalment upon a bond, that those preceding have also been paid: but such payment must be in the manner and at the time contemplated by the parties; for whenever any course is pursued, different from the terms of the contract, it of itself, affords a presumption that the parties are then acting under some new agreement, and not in discharge of the first contract: in such a cuse, therefore, the *law* would not presume any thing. A legal presumption only arises from the *regular* fulfilment of the contract, where the parties are seen acting according to the *time* and in the *order* and *manner* agreed upon for the performance of the *last* engagement, and the performance of the preceding part is implied, from the unexplained regular performance of the latter.

In this case, the last payment is endorsed on the bond, but is expressly restricted to be in *part payment.* The judgment was obtained in January, 1783, months before the last instalment was due; yet the last payment is there credited in the judgment—it must, therefore, have been an anticipated payment.

The plaintiff then issues execution and levies it on defendant's lands, who never complained of any injustice, and it appears from the testimony of the witness present when the last payment was made, that it was in a horse, and was agreed to be *credited* on the bond.

If the contract had then been fully complied with, it is difficult to account why, instead of agreeing to credit the bond, the bond itself was not agreed to be cancelled or delivered up, or why a receipt in full, or why, in short, the parties did not declare the bond paid. We cannot, therefore, perceive the least ground for presuming the bond paid, but should presume, from the whole circumstances, diametrically the reverse.

Wherefore, we are all of opinion the rule for a new trial should be made absolute.

NOTE.—By the act of 1783, (1 Rev. Stat. ch. 31, sec. 93) all judgment ment bonds &c with power to any person to confess judgment thereon, shall be void as to the power, but may be proceeded on as common bonds.

TEARE *vs.* WHITE'S ADM'RS—Page 112.

A plea of alien enemy, entered at a term subsequent to that at which the original pleas were entered, is not a plea in bar of the action generally, but only in bar of the further maintenance of the suit, and, being a plea since the last continuance shall not since the act of 1796, (1 Rev. Stat. ch. 31, sec. 62,) amount to a relinquishment of former pleas.

When a subject of the King of Great Britain was duly naturalized in one of the States, before the adoption of the Federal Constitution, and continued to reside there till that event, he became by virtue of it a citizen of the United States.

This was a *sci. fa. vs.* the defendants, suggesting assets, who, at the return, pleaded *nul tiel record* and no assets; and at a subsequent term the defendants pleaded the following plea, viz:

"And now at this day, that is to say, on the 26th of October, until which day the plea aforesaid was continued, comes the said Peterson Brown, by William H. Murfree his attorney, and the said Robert Teare, by his attorney William Slade, Esq. and the said Peterson Brown saith, that the said Robert Teare ought not to have or maintain his aforesaid action thereof against him, because he saith that after the last continuance of this cause, to wit, on the 20th day of April, from which day this cause was last continued, and before this day, to wit, on the 18th day of June, 1812, he, the said Robert Teare, became an alien enemy, by virtue of an act of Congress, passed on the said 18th day of June, entitled "An act declaring war between the United Kingdom

of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories," because the said Robert Teare is an alien, born at London, in the United Kingdom of Great Britain and Ireland, in parts beyond the seas, under the legiance of his Magesty George III. an enemy of the United States of America and of the State of North Carolina, and to the enemies of the same now adhering; and this the said Peterson Brown is ready to verify: Wherefore he prays judgment if the said Robert Teare ought further to have or maintain his aforesaid action against him the said Peterson Brown, &c."

To which the plaintiff replied,—and at the succeeding term the jury found against the plea, (no other plea being submitted to them.) The defendant, to support the plea, gave evidence that the plaintiff was born in England, and came to Virginia subsequent to the peace of 1783. To prove naturalization, the plaintiff gave in evidence the following certificate, viz.

"At a court held for Nansemond county, July 10th, 1786, Robert Teare, lately from the Kindom of Great Britain, came into court and took the oath of a citizen and resident of this State, which is ordered to be certified."

STATE OF VIRGINIA,
Nansemond County, to wit:

I John C. Littlepage, clerk of the court for the county aforesaid, do hereby certify that the foregoing is a true copy from the records of my office. In testimony whereof, I have hereunto set my hand and caused the seal of my office to be affixed, this 9th day of November, 1812, and in the 37th year of the Commonwealth.

[*Signed*] JOHN C. LITTLEPAGE, Clk.

(Seal.)

Nansemond County, to wit:

I Josiah Riddick, presiding magistrate for the county aforesaid, do hereby certify that John C. Littlepage, whose hand is affixed to the foregoing certificate, is clerk of the court for the county aforesaid, and that due faith and credit ought to

be paid to all his acts as such, and that his attestation to the foregoing certificate is in due form of law.

[*Signed*] JOSIAH RIDDICK.

Certified this 9th day of Nov. 1812.

It is submitted to the Supreme Court, to determine, whether, from the certificate aforesaid, by the laws of Virginia, (which by consent are admitted to be referred to in the printed Statute Book) the plaintiff became naturalized. It is further submitted to the Supreme Court to determine, whether the foregoing plea be in abatement or in bar,—and if in abatement, whether it was a relinquishment of the former pleas: And for the Supreme Court to determine what course this court is to pursue.

The case was submitted without argument.

TAYLOR, C. J. This is a plea of alien enemy, which, from it's conclusion, might be called a plea in bar, as it asks the judgment of the court, whether the plaintiff ought further to have or maintain his action. An issue being joined on the replication to the plea, the jury found it untrue in point of fact. It is now to be decided whether the plea amounted to a waiver of the other defences previously entered: and whether the evidence to disprove the allegation in the plea was properly received.

As to the first question, it is believed to be an established principle that no matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the further maintenance of the suit; for by thus pleading a collateral thing which happens after the action brought, it is admitted that the action was well brought, but by reason of the new matter, the plaintiff ought not further to proceed in it. So that although the plea in this case begins and concludes as a bar, yet the words "ought further to have or maintain," shew it to be a plea *puis darrein continuance*. Pleas of this description may be either in bar or abatement, according to the fact relied upon, Sys. of Plea 365; and as the act of 1796 does not distinguish between them, but expressly directs that a plea *puis darrein continuance* shall not amount to a relin-

quishment of former pleas, we cannot say that such effect is produced in the present case.

2. As to the proof of naturalization, we think it the best that could have been introduced. The plaintiff was made a citizen in a court of competent jurisdiction, before the adoption of the constitution, when each State had power to confer such a privilege according to its own conceptions of policy. The subsequent adoption of the constitution of the United States admitted all the citizens of the respective states to an equal participation of its benefits. This cause must therefore be remanded to be tried upon the pleas originally entered.

NOTE.—Upon the first point, see *Morgan* v *Cane*, 1 Dev. & Bat. Rep. 234, which decides that a plea in abatement since the last continuance, necessarily operates a relinquishment of previous pleas in bar, notwithstanding the act of 1796, (1 Rev. Stat. ch. 31, sec. 62.)

CLAYTON AND WIFE *vs.* MARKHAM—Page 115.

Where A. conveys to B. with warranty, and B. to C. with warranty and C. is evicted, whereupon R. pays C. and A. pays B. A cannot support an action of ejectment for the land, for having once conveyed it, the repayment of the purchase money cannot operate as a reconveyance.

This is an action of ejectment to recover a tract of land to which the plaintiffs claim title in the following words, viz. "Anthony Markham, who was seized and possessed in fee of the premises in dispute, by deed with warranty, conveyed to John Pointer, in 1757—John Pointer died about the year 1783, and the plaintiff is his heir at law. John Pointer, in his lifetime, conveyed the premises in question to Stephenson, Stephenson conveyed to Morris, Morris conveyed to Cyprian Shepard in 1800. In 1802, the defendant, claiming title to the land, sued Shepard for a tresspass on it, and recovered a verdict. After this recovery, Shepard, on application

to the representatives of Stephenson, who had warranted, received the value or consideration money. Stephenson's representatives received from the representatives of John Pointer, who had also warranted, the greater part of the value or consideration money—This consideration money or value, in each of these cases, was paid voluntarily and without suit.

"The plaintiff Elizabeth, about seven years ago, being then under age, intermarried with the plaintiff John Clayton. There has been no re-conveyance of the premises in dispute from Shepard, Morris or Stephenson."

The question submitted to the Supreme Court is, whether the plaintiffs have shewn a sufficient title in themselves to recover in the present action? If they shall be of opinion for the plaintiffs then judgment to be entered for them—if otherwise, then judgment to be entered for the defendant.

The cause was submitted without argument.

SEAWELL, J. delivered the judgment of the court.

The plaintiffs in this case claim title, as heirs of Pointer; and it appears from the case, that Pointer conveyed in his lifetime to Stephenson. If, therefore, Pointer ever had any interest, having conveyed it, nothing was left to descend to his heirs.

The repayment of the purchase money can have no influence on the case: it can in no respect operate as a re-conveyance of the legal estate of lands. Wherefore, we are all of opinion there should be judgment for the defendant.

GREGORY *vs.* HOOKER'S ADM'R—Page 116.

Where a sale was made by an administrator under the act of 1794 (see 1 Rev. Stat. ch. 46, sec. 11) on a credit, before the commencement of the action, but the proceeds not received until after plea pleaded, proof of these assets shall not be given against the administrator. For the issue is whether the administrator had assets at the time of plea pleaded; and the plaintiff may prove assets received by the defendant, between the time of issuing the the writ and entering the plea, but not afterwards.

In a *sci. fa:* upon a judgment *quaudo* the plaintiff may recover such assets coming to defendant's bonds after plea pleaded in the original action, as are not already bound by outstanding judgments.

This is an action on the case, on an open and unliquidated account. The writ issued 28th of May, 1810. At August term following, the defendant, by his attorney, entered the following pleas: "Gen. issue, set off, stat. lim. fully administered, no assets, judgments and bonds, &c. no assets ultra, property sold under act of assembly, money not yet due." The plaintiff in order to shew assets in the hands of defendant, introduced an account of sales returned by the administrator into the county court, which sales were made on the 1st day of May, 1810, under an order of the county court, to the amount of £182

Money received by administrator in possession of deceased. 32 10

She also proved that, after plea pleaded, the administrator sold property of the deceased, on the 1st of September following, to the amount of 377 6

That the deceased being a Physician and in partnership with Dr. Haywood of Tarborough, was, at the time of his death, entitled to one-third part of the bonds, notes and accounts of said firm. That Dr. Haywood was surviving partner, who placed these notes and accounts in the hands of trustees for collection, and that the defendant agreed to receive one-third

of these notes and accounts in discharge of his claim as administrator against said Haywood, in the month of February preceding the issuing of this writ, and by him received on the 31st of May, 1810, but received no part of the money arising from said collection, until November thereafter, to the amount of	375
	£966 16

And the witness thought these notes and accounts good, except as to fifty dollars. It further appeared that the money arising from the first sale, was not received by administrator until aftar plea pleaded, as well as the amount of the money arising from the notes and accounts aforesaid.

The defendant, to shew his disbursements or application of assets, proved that three several writs sued out in June, 1810, on bonds due from the intestate, were prosecuted to judgments, subject to such assets as should come to his hands after the date of said judgments, to the amount of £531 15

That the intestate was, by a division made by commissioners of his father's estate, indebted to the amount of which, from a receipt, he paid in March preceding the plaintiff's action.	71 17
Two judgments, before a justice of the peace, on notes of hand	38 14 6
Judgment on a signed account	12
Account for funeral expenses	5
Fees paid clerk for taking out administration	1
Allowance for commissioners	41 12 6
Retainer for his own account for making a shirt	12 6
Sawyer's bond paid	71 17 7
	£774 9 1

On the above statement of facts, it is submitted to the Supreme Court to decide, whether the above sum of £182,

arising from the first sale, was or was not assets subject to the plaintiff's demand, the money arising from said sale not having been received until November after the plea pleaded?

Whether the agreement of the defendant to receive a third part of the notes, bonds and accounts of the firm of Haywood and Hooker, in discharge of his claim against said firm, in February preceding the plaintiff's writ, although no part of the money arising therefrom was received until November thereafter, was or was not assets subject to the plaintiff's demand?

If the £182 should not be considered assets liable to the plaintiff's demand, ought they not to be considered as the assets out of which the debt of £71 17*s.* and the remainder of the vouchers claimed by defendant ought to be paid, and thereby leave the balance of the assets liable to the demand of the plaintiff?

The jury found a verdict for the plaintiff for the sum of £81 8*s.* 5*d.* that the defendant had assets, under the charge and direction of the presiding Judge. Motion for new trial.

Baker, for the plaintiff. The verdict has been properly found, because the plaintiff obtained the first lien upon the produce of the sales, which ought to be applied to the payment of this debt. The act 1794, *Cap.* 14, makes it the duty of the administrator to recover and receive the money on such sales, when the time of payment is past, or otherwise he is chargeable for it; and the monies when received shall be liable to the satisfaction of judgments previously obtained.

The money received from the partnership debts is also liable to the plaintiff's demand; because the agreement to receive it in discharge of the surviving partner, was made in February preceding the issuing of this writ. It is very clearly laid down, that executors may make monies assets in their hands, without having received them, by making releases, or acquittances, or acknowledgments of satisfaction. This amounts to a receipt and charges the executor. 1 *Wentw.* 70. 2 *Wentw.* 147. *Comyns. Dig. Tit. Adm.*

Browne, for the defendant. The money arising from the

sale was not received until after the plea pleaded, and cannot therefore, upon these pleadings, be made chargeable as assets in the defendant's hands. 1 *Saunders* 336. 2 *Saunders* 216. The ganeral doctrine is not denied, that an administrator may charge himself, without having received the money; but that is where he has a legal right to receive it. The remedy upon these partnership debts survived to *Haywood*, from whom the defendant might claim his intestate's proportion of the balance. The defendant acquired only an equitable right to receive the money by the transfer from *Haywood*. The subject then should be considered in the manner that it would be in a court of equity, where it is held, that an executor shall not be held charged with the money by altering the security. 1 *Cases in Chanc.* 74.

Taylor, C J. delivered the judgment of the Court.

The sale was made by the administrator before the commencement of the action, but the proceeds of it were not received by him until after plea pleaded, and the question is, whether such proceeds are liable, as assets, to the plaintiff's demand? If the plea of *plene administravit* were drawn out at length, it would state "that he has no goods or chattels which were of the said intestate at the time of his death, in his hands to be administered, nor had at the time of suing out the writ of the plaintiff, nor ever since."—When issue is taken on this plea, one question presented is, whether the defendant had assets at the time of pleading? To establish which the plaintiff may go into proof of assets received by the defendant after the issuing of the writ, and between that period and the time of entering the plea. But no proof can be given of assets received after the latter period, because they cannot be received in this action. If the plaintiff cannot prove that the defendant had assets at the time of the commencement of the suit, or that assets have come to his hands since then, and before the plea, he may pray a judgment *quando acciderint*; and in a *scire facias* on such judgment, the plaintiff may recover such assets coming to the defendant's hands after the plea, as are not already bound by outstanding judgments. This principle applies

to every question which the court are called upon to decide in this case; for none of the several sums claimed were received until after the plea. The bare agreement to receive the bonds and notes from the surviving partner cannot charge the administrator, for he had no right to sue for them, and the probable effect of such agreement was not to waste or diminish the fund out of which the creditors were to receive payment, but to call it sooner into activity. There must be a new trial.

NOTE.—See S. C. on a former trial reported in 2 Murph Rep. 250. *Miller* v *Spencer*, Ibid, 281. *Littlejohn* v *Underhill*, post 574. *Roundtree* v *Sawyer*, 4 Dev. Rep. 44. The act of 1823 (1 Rev. Stat ch. 46, sec. 23-26) allows an executor or administrator nine months after his qualification to plead; and declares that the commencement of a suit or service of a writ shall not create any lien on the goods of the testator or intestate, but that the executor or administrator shall be at liberty to sell them, as if such writ had not been served on him or such suit commenced.

RAGLAND'S EX'RS *vs.* PARISH CROSS—Page 121.

When a bond is given for the hire of a slave for a year, in the course of which time the slave becomes disabled and ultimately dies, there can at law be no apportionment of the sum agreed to be paid,

This is an action of debt brought upon the bond, which accompanies this case. This bond was given for the hire of a negro. A few months after the hiring, the negro being in the possession of the defendant, and in the ordinary discharge of this duty to the defendant, cut his knee pan with a drawing knife. An inflamation took place and his situation was considered dangerous both by the defendant and the plaintiff's testator, Frederick Ragland; whereupon Frederick Ragland took the negro to his own house. There is no evidence of any express consent given by the defendant for the removal of the negro to Ragland's house. The knee mortified and the negro died. The defendant insists that

he ought not to be compelled to pay any more of the bond than shall be proportional to the time of service of the negro, and should be relieved from the payment of the residue of the bond, by reason of the death of the negro.

It is submitted to the Supreme Court to decide, whether, upon these circumstances, the defendant is entitled to the relief he insists for, upon any principle of law or equity—and it is agreed that the court shall decide this case in the same way as if the defendant had applied to a court of equity for relief.

The case was submitted without argument.

Taylor, C. J. As this case was commenced in a court of law, and has not been removed to another jurisdiction, we must take the principles of law for our guide. On such alone we profess to decide it, as it would be novel and irregular to apply equitable considerations to a case not properly constituted in the proper forum. There is no principle or authority which warrants the apportionment of the sum secured by the bond in this case. The distinction is well settled between those covenants implied by law and the obligation created by the act of the party. In the first case, if the party, without default in him, is disabled from performing it, and has no remedy, the law will excuse him. A tenant is liable to waste, but if the house be destroyed by enemies or tempest, he is excused. But if he covenant to repair the house, he is bound by his contract although it should be destroyed by lightning or by enemies, because he might by his contract have stipulated against such liability. In *Dyer* 33, a lessor covenanted under a penalty to sustain and repair the banks of a river, which were afterwards destroyed by a sudden inundation. It was held that although he was excused from the penalty, he was bound to repair in convenient time. In *Allen* 20 it was decided that a lessor was liable by his covenant to pay the rent, although he had been driven from the premises by public enemies. These ancient authorities, to which others might be added, have been affirmed by an uniform current of modern decisions. In 2 *Str.* 763, the tenant was held liable on a cove-

nant to pay the rent, though he had no enjoyment of premises by the default of the lessor, who had covenanted to repair, which he failed to do after the house was destroyed by fire. In 1 *Term Rep.* 710, Mr Justice Buller says, "a lessee is obliged to pay rent, even though the premises should be burned down." There is no principle of the law better established than that an apportionment of the debt cannot be made in a case of this kind. There must be judgment for the plaintiff.

NOTE—See *Williams* v *Jones*, 2 Murph. Rep. 54.

GENERAL RULES—Page 123.

The Judges of the Supreme Court, with a view to improve the administration of justice by expediting the trial of causes and precluding a laxity of practice tending to impair the security and rights of the citizens, have availed themselves of the power confided by the act of Assembly, and established the following

RULES OF PRACTICE:

I. It is ordered by the court that all causes now set for hearing on the equity dockets, shall be prepared for trial by the ensuing fall term; after which period, no further time to complete testimony shall be allowed to either party, without special order. And no cause in equity shall hereafter be set for hearing until the testimony shall be completed.

II. That in all suits at law brought on trial for at the ensuing fall term, or thereafter, declarations shall be filed before the trial; and no suit shall be tried after that period, unless this rule be complied with.

III. That in all causes, civil and criminal, where no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

IV. Where several counsel are employed on the same side

the examination or cross examination of each witness shall be conducted by one counsel; but the counsel may change with each successive witness.

V. When a party in any civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony, and what he expects to prove by it.

VI. No person who is bail in any suit, either civil or criminal, or who is security for the prosecution of any suit, shall appear as counsel or attorney in the same cause. And it shall be duty of the clerks of the several superior courts, to state on the docket for the court, the names of the bail and security for the prosecution in each case.

VII. No entry shall be made on the records of the superior courts (the appearance docket excepted) by any other person than the clerk, or his regular deputy.

VIII. In all cases of general replication, no special matter shall be heard.

IX. From and after the next term of the Supreme Court, no applicant for license to practice law in the courts of this State shall be examined, except during the terms of the Supreme Courts. Licence to practice in the county courts only shall be granted in the first instance. Nor shall any person be admitted to practice in the superior courts, until one year after having obtained licence to practice in the county courts.

Note.—By a rule made by the Supreme Court at December Term, 1838, 4 Dev. & Bat Rep. 185, all applicants for admission to the bar must present themselves for examination during the first seven days of the term.

CASES ADJUDGED IN THE

SUPREME COURT OF NORTH CAROLINA,

July Term, 1815.

SMITH *vs.* WALKER'S EX'RS—Page 245.

A *qui. tam.* action for usury abates by the defendant's death.

This was an action of debt *qui. tam*, under the statute of usury, brought against Walker in his life-time; and upon the return of a *sci. fa.* to revive it against his executors, they pleaded specially that the action being founded in *malefício*, and unaccompanied with a duty, did not survive against them. To this plea there was a demurrer, which was over-ruled in Brunswick Superior Court, from whose judgment the plaintiff appealed to this court.

No argument was made on the case.

TAYLOR, C. J., delivered the judgment of the court.

The common law principle, relative to the abatement of suits by the death of the parties, has undergone such a variety of legislative alterations, that some attention is necessary to mark with precision what actions will now survive against personal representatives.

It was once doubtful, whether, from the general terms in which the maxim is expressed, the action of assumpsit did not come within its operation; because its form was trespass on the case, which imputed a wrong, and its substance was to recover damages in satisfaction of the wrong. But when, after much discussion, this doubt was removed, on the principle that the testator's property had received a wrong, and that he consequently gained an interest, we are furnished with the plain and intelligible restriction of the rule, to all cases where the declaration imputes a hurt done to the person or property of another, and the plea is not guilty; thus including every case where the cause of action a-

rose *ex delicto*. But all actions survived that were founded on any contract or duty to be performed, excepting the action of account, and the action of debt on simple contract, to which the law wager was attached. The first, because the account rested in the privity of the testator; the other, because the executor would lose the benefit of the law wager.

The first relaxation of the rule, now necessary to be noticed, was made by the statute 4 Ed. 3, c. 7, which gave to executors an action of trespass for taking away goods, in the life-time of the testator; and this remedy was extended to executors of executors by statute of 25 Ed. 3 c. 5, and to administrators by 34 Ed. 3 c. 11. Although the first statute makes use of the word *trespasses* only, yet a series of adjudications under it, made in a spirit of liberal interpretation, have produced the rule that an executor or administrator may prosecute the same actions for an injury done to the personal estate of the testator or intestate, in his life time, whereby it is become less valuable, that the testator or intestate himself might have done. Notwithstanding these statutes, the common law maxim operates with full force, in England, with respect to the person by whom the injury is committed; for, if he dies, no action arising *ex delicto*, where the plea is not guilty, can be brought against his executor or administrator—though, for taking away goods, a remedy may be had against them in another form.

The act of 1799 enumerates the actions of *trover*, *detinu* and *trespass*, where property either real or personal is in contest, and the action is not merely vindictive, and provides that they shall shall not be abated by the death of either party. With respect to the action of detinue, the act was unnecessary; because that action might have been brought before, either by, or against an executor, to recover goods in the hands of the wrong doer or his executor. Sir William Jones, 173. The actions of trover and trespass might both have been brought by an executor, under the construction of 4 Ed. 3; so that all the operation of this act is, to enable them to survive against executors, and to prevent the action of trespass from abating by the death of either party, where real property is in contest.

The act of 1805 extends a similar provision to the actions of *trespass vi et armis*, and trespass on the case, brought to recover damages done to property either real or personal.

The same equitable construction given to these acts of Assembly, which has heretofore been put upon the antient statutes, will permit not only all actions to be brought by, or revived against, executors or administrators, which might formerly have been brought by them, but likewise other actions which are embraced by the more comprehensive words of the acts. The common law maxim still applies to injuries done to the person, and to all others which are in the nature of crimes, and consequently to all actions upon penal statutes, relative to acts arising *ex maleficio*, and where no right or duty is vested in the plaintiff. Wherever a duty is so vested in the plaintiff, it is probable that the true construction of our acts of Assembly, would sustain even a penal action against executors, as it has been held in England, under the statute of Ed. 3, that an action of debt will lie by executors, for not setting out tithes. The statute, however, which authorises such action, gives the penalty to the party grieved; and the tithes which ought to have been set out, were a vested right in the testator. The present suit is brought for an offence, and the penalty is given, in part to any one who will sue for it—We are therefore of opinion, that it is not one of those cases, which the acts of Assembly meant to provide for; and that the crime is buried with the defendants' testator.

Let there be judgment for the defendants.

NOTE.—See acc. *Blount* v *Fish*, 1 Hay. Rep. 502. See also *Browne* v *Blick*, 3 Murph. Rep. 511,

PORTER *vs.* WOOD—Page 248.

Where the plaintiff neglected to produce on the trial an essential part of the evidence necessary to support his demand, and he alleged that he was taken by surprise, as the objection for the want of this evidence had not been made on several former trials, a new trial was refused.

This was an appeal from the decision of Edgcomb Superior Court, awarding a new trial to the plaintiff, upon an affidavit which stated in substance, that he had instituted this action against the defendant, for neglect of duty as a constable, whereby the plaintiff had lost the amount of a judgment recovered by him, before a magistrate, against Lawrence. That upon two trials in the county court, he offered the judgment of the magistrate as evidence of the amount of damage, which was received without exception—the defence being rested on an alleged misconception of the action—whence he believed it would not be necessary for him to provide evidence to prove the amount of the judgment in the Superior Court; that he was unprepared to do this, when the exception was taken, though he can do it by the next term; and that the same counsel defended in both courts.

Taylor, C. J. It was an essential part of the plaintiff's evidence to prove his account against Lawrence, yet no witness attended for that purpose, nor does any appear to have been summoned. After so many trials, to grant a new one that the plaintiff may prepare his case, and do that, which ought to have been done from the time the pleas were entered, does not seem to be proper, from any reasons laid before us.

Motion for a new trial over-ruled.

Note.—*Rutledge* v *Read*, 2 Hay. Rep. 242, and the cases referred to in the note to the last point in that case.

RAY *vs.* SIMPSON—Page 249.

When the defendant in an action of ejectment died between the Spring and Fall Terms of the same year, and his death was suggested at the latter, a service on the guardian of the infant heirs on the first day of the ensuing term is sufficient under the act of 1799, (1 Rev. Stat. ch. 2, sec. 7.)

The defendant died between Spring Term, 1814, and Fall Term, 1814,—at which last mentioned term his death was suggested of record.

On the first day of this present term (say Spring, 1815,) the plaintiff served on the guardian of the heirs at law of Simpson (he having died intestate) a copy of the declaration in ejectment, with notice to appear and defend the suit.

It is referred to the Supreme Court to decide, whether such service prevents the abatement of the suit?

TAYLOR, C. J. There can be no doubt of the sufficiency of this service, under the act of 1799, C. 8—the words of which are, that no action of ejectment shall abate by the death of the defendant, but the same may be revived by serving on the guardian within two terms after his decease a copy of the declaration, with notice to appear and defend the suit; and after such service the suit shall stand revived. This is in the case where the heirs are infants as they are here. Now this service was made within the second term after the death of the defendant, and is consequently within time.

DARK *vs.* MARSH—Page 249.

Under the act of 1791, (1 Rev. Stat, ch. 34, sec. 73,) which gives a penalty for harboring and maintaining runaway slaves, harboring means a fraudulent concealment, and the maintaining must also be secret and fraudulent.

Where slaves ran away from the plaintiff and were found in the possession of the defendant, who openly maintained them and gave notice to the plaintiff that he should retain them, until recovered by law, *it was held* that no action could be sustained under the act of 1791.

This was an action of debt to recover the penalty under the 4th section of the act of 1791, against harboring slaves. The declaration contained three counts. 1. For enticing and persuading the slave to leave the plaintiff's service. 2. For harboring and maintaining the slave, knowing her to be runaway. 3. The same as the second count, with respect to a negro child. The jury found a verdict for the plaintiff, subject to the opinion of the court, on the following case. The plaintiff proved a title to the two slaves, mother and child, under a bill of sale, and possession of them from February, 1807, until the September following, when she absented herself, with her child, in the night time, taking with her all her apparel, and was the next morning in possession of the defendant, who, at that time, gave notice to the plaintiff of the fact, and said he should retain them until recovered by law; as he claimed them as his father's property. The defendant has had them in possession till 1813, harboring and maintaining them, but in an open and avowed manner, the woman being the wife of one of his negro men. The plaintiff sued out a writ of detinue for the slaves in 1807, and in September, 1813, recovered them, and damages for the detention. The writ in the present action was sued out in 1809.

SEAWELL, J. delivered the judgment of the court.

The jury have found for the defendant on all the counts in the declaration, except the one for *harboring* and *maintaining* the slave as a runaway: Upon that count we think

there can be no doubt as to what verdict they should have found, under the facts which form the case. The act of Assembly gives a penalty, where any person shall "harbour or maintain, under any pretence whatever, any runaway servant or slave." Now, it has been contended by the plaintiff's counsel, that if the slave was runaway, and was in the possession of defendant, and retained by him, that it was then such a case as was provided for by the act, which, from the words, "under any pretence," would reach every possible case. That the Legislature was competent to give a penalty in such case, we do not deny, but feel warranted in saying they have neither *said* so, or *intended* it, in this case.

The act has in *express* words given a penalty for *harboring*;—harboring is a term well understood in our law, and means a *fraudulent* concealment—and the Legislature not having said in what *a maintaining under any pretence* consists, we are left to find it out by construction.

To us it seems clear, that it is a safe rule in construction, where acts of a known and definite meaning are described as constituting an offence, and then other words of a general nature are used as synonimous with the former, and apparently with a view of giving to the act a liberal construction in suppression of the mischief, that these *general* expressions should not render penal by construction, any act which does not partake of the *qualities* of the act *specially* set forth:—Such a construction would lead us to say, that the maintaining, intended by the Legislature, was *secret* and *fraudulent*—this being negatived by the statement of the case, we think the jury should have found for the defendant on this count, and are all of opinion there should be judgment for the defendant.

Note.—See acc. *Thomas* v *Alexander*, 2 Dev. & Bat. Rep 385. *State* v *Hathaway*, 3 Dev. & Bat. Rep. 125.

STATE *vs.* HASHAW—Page 251.

When an indictment is found, upon which the defendant is recognised to appear from term to term, and afterwards a *nolle prosequi* is entered upon a defect being discovered in the bill, the defendant will be liable to pay for the attendance of the witnesses the whole time, if a new bill be found against him for the same cause and he be convicted thereon.

At September Term, 1811, a bill of indictment was found against defendant, and was continued from court to court until September Term, 1814, when a *nol. pros.* was entered in consequence of a defect in bill, and a new bill was found against defendant for same offence, upon which he was tried and convicted.

Question for Supreme Court,—Is the defendant bound to pay the State's witnesses from the finding of the first bill until the *nol. pros.* was entered?

TAYLOR, C. J. We think it very clear that the defendant is liable to pay the witnesses for the whole time of attendance. The charge, of which he was convicted, was the same upon which the witnesses attended, and though the indictment was altered in point of form, yet neither the defendant nor the witnesses were discharged during the time; the latter were subpœnaed or recognized to give evidence against him on a specific charge; they did so, and he was convicted.

BRANCH *vs.* ARRINGTON—Page 252.

A guardian is chargeable for interest on the accumulated balance of principal and interest annually, after deducting the necessary expenditures for his ward; unless he shows to the satisfaction of the court such equitable circumstances, as ought, in conscience, to acquit him of his accountability for such interest.

The only question arising in this case was,—on what

principle ought interest to be charged in a guardian's account with his orphan? To establish which, the case was referred to this court.

CAMERON, J. delivered the opinion of the court.

By the 9th section of the 5th chapter of acts of 1762, the Legislature have enacted, that "every guardian shall annually exhibit his account and state of the profits and disbursements of the estate of such orphan, upon oath." By the 10th section of the same act, they have further enacted, that "where the profits of an orphan's estate shall be more than sufficient to maintain and educate him, or her, the guardian or such orphan shall lend the surplus, and all other sums of money in his hands, belonging to such orphan, upon bond with sufficient securities, to be approved of by the next succeeding court, and to be repaid with interest, which interest such guardian shall account for annually."

The question arising on the construction of the foregoing sections, is,—whether the guardian is accountable for interest on the accumulated balance of principal and interest annually, after deducting the necessary expenses of his ward? A majority of the court are of opinion, that he is; because, independently of the just claim of the ward, to have the excess of the profits of his estate converted into an active fund, and of the injustice of permitting the guardian to retain the money of his ward, in his own hands, making gains for himself, the act has expressly required him to account for the interest *annually*. By this we understand, that the guardian is not only bound to exhibit the amount of interest which accrues on the debts due his ward, in his annual account, but he is bound to bring such interest into his account, debiting himself with the amount thereof, and forming a part of the aggregate amount on which the succeeding accumulation of interest is to be estimated. Should the debtors of the ward neglect or refuse to pay the interest due on their bonds at the expiration of the year, the guardian is bound, within a reasonable time, to coerce the payment of the principal and interest, and when recovered to lend the same to some more punctual person.

It is not intended to place such a construction on the act, as will, at all events, compel the guardian to account for, and pay interest, on the balance of principal and interest, at the expiration of each year. We only lay it down, on the general principle resulting from the just and necessary construction of the act, that he shall be chargeable with the interest annually, unless he shews to the satisfaction of the court, such equitable circumstances as ought, in conscience, to acquit him of his accountability for such interest.

SEAWELL, J. and TAYLOR, C. J. dissented.

NOTE.—See *Ryan* v *Blount*, 1 Dev. Eq. Rep. 382. *Hodge* v *Hawkins*, 1 Dev. & Bat. Eq. Rep. 564. *Spack* v *Long*, 1 Iredell's Eq. Rep. 426. By the act of 1816 (1 Rev. Stat ch. 54, sec. 13,) all bonds, notes &c. taken by a guardian as such shall bear compound interest—See on the construction of this act, *Wood* v *Brownrigg*, 3 Dev. Rep. 430, which decides that a guardian can recover compound interest on such bonds no longer than until his ward comes of age.

ARRINGTON *vs.* ARRINGTON'S HEIRS—Page 253

Where a deed was executed by a woman and her intended husband, before their marriage, by which he conveyed all the land he then had or might thereafter acquire in trust for certain purposes: *it was held* that this deed could only operate upon such lands as the bargainor had at the time of its execution, and that lands acquired subsequently did not pass under it; and that therefore the wife was endowable of all the lands subsequently acquired.

This was a petition for dower out of several tracts of land owned by William Arrington, the deceased, at the time of his marriage, and several others acquired by him afterwards, of which he died seized.

The defendants plead that the widow is barred of her dower by an agreement entered into between her and her husband, whereby she agreed to claim no dower in the lands of which her husband was then, or should afterwards be-

come seized. The deed referred to in the plea, was executed by William Arrington and the petitioner, before marriage, and in contemplation of it: it conveyed to a trustee all the lands which Wm. Arrington then owned, and all which he might thereafter acquire, in trust that he should be permitted to enjoy them during his life, or sell them if he thought proper; and in failure of his doing so, in trust for the use of such persons as he shall appoint by his will; or if he die intestate, to the use of his children. The deed contained no covenant on the part of the petitioner; nor was it expressed to be in satisfaction or lieu of dower.

TAYLOR, C. J. It is certain that this deed could only operate upon such lands as William Arrington owned at the time of its execution: lands afterwards acquired did not pass under it, however plain the intention of the bargainer and the words of the conveyance. Of the several tracts, therefore, specified in the petition, as purchased after the marriage, the widow is endowable, if the seisin continued in her husband at the time of his death. The plea must, therefore, be overruled, and dower assigned according to this principle.

BIZZELL *vs.* BEDIENT—Page 254.

A creditor, who is a citizen of this State, may attach the property of his debtor found here, though such debtor is a citizen of New York, and, by an insolvent law of that State, his property has been assigned for the general benefit of his creditors.

The plaintiff, a resident of this State, sued out an original attachment against the defendant, a resident of New York, and levied upon monies in the hands of Sutton, who, being summoned, sets forth in his garnishment, that Bedient was discharged under an insolvent act of the State of New York, and all his property assigned to trustees for the general ben-

efit of his creditors; that the monies in his hands were received by him in virtue of a power of attorney given by the assignees to Skinner in this State, and by Sinner to him—that he does not therefore consider them as the monies of Bedient, but of the assignees.

It was admitted in the case, that although the plaintiff had been a resident in this State from the commencement of the account, yet that it arose from disbursements and other expenses incurred by him as master of Bedient's vessel, in different parts of the world.

Taylor, C. J. delivered the opinion of the court.

We cannot perceive any satisfactory reason why the plaintiff, who resides in this State, should not have a right to recover his debt out of any of his debtor's property found here, which is not bound by a prior lien. If it be objected that the debtor's property, wherever situated, had been previously assigned, by a law of the State of which he was a citizen—that such assignment was for the benefit of all his creditors, and that no one of them, in the event of a deficiency, should recover his whole debt, to the injury of the rest—we answer, let the assignment bind all the citizens of New York, and let it have full effect even here, when it does not conflict with the rights of our own citizens. Upon all questions arising between persons, resident in New York, its laws should in justce operate; but they ought not to have *extra* territorial force in binding the rights of residents of this State, who have no share in forming them, and are destitute of the means of ascertaining what they are. A creditor who, availing himself of the laws of his own country, attaches the property of his debtor found in this State, ought not to be turned round to seek payment under an assignment in another State. In one of the latest cases to be found in the books, it is held that a discharge under a foreign bankrupt law, will not bar an action for a debt arising in England, to a creditor residing there also. 1 East 6. Though if a debt contracted in a foreign country had also been discharged by the laws of that country, this would have been a discharge every where. The laws of foreign

countries must be recognized as binding on personal property in a variety of instances—but the general rule must be taken with the exception of such laws interfering with the rights of our citizens here. Wherever one or the other must yield, our own law is entitled to the preference.—5 East 131.

From the numerous decisions which have taken place in England, relative to the operation of their bankrupt laws in the colonies, they are not held to affect *bona fide* creditors there who will not avail themselves of them. The assignees of a bankrupt in England may recover debts due to him in the colonies, in the same manner as if he had made an assignment of his property to them for a valuable consideration. No injustice can proceed from such a system, because the debt is the property of the bankrupt, and is assigned, with his consent, for a valuable consideration: as a subject of, and resident in Great Britain, he gives his implied assent to every legislative act of the country, and, amongst others, to the bankrupt laws. The debtor not being locally resident in England, is not bound, without actual notice, to take cognizance of any legislative or judicial act. If, therefore, without knowing of the disposition of the bankrupt's property, he pays the debt in good faith either to the bankrupt himself, or to any person in his behalf lawfully empowered, he shall not be accountable to the assignees. If it is recovered from him by judicial proceedings, he shall not be accountable to them—Douglass 169—3 Term Rep. 125. And it does not seem to have been doubted, that a foreign creditor is not bound by the bankrupt laws at all, if he recover a judgment *bona fide*, and has legal possession, according to the laws of another country, of any part of the bankrupt's estate.

It is also to be considered, that an insolvent law of this State would not discharge a debt contracted in New York, to a creditor resident there—this has been decided in their courts there, as appears in several of the books of reports. Upon the whole, we are of opinion, that so much of the money in the garnishee's hands should be condemned, as is sufficient to satisfy the plaintiff's judgment.

ORR *vs.* McBRYDE, SHERIFF—Page 257.

A surplus of money in the hands of a sheriff, raised by execution, is the property of the defendant in the execution—is held by the sheriff in his private and not in his official capacity, and is liable to attachment in the hands of the sheriff by the creditors of such defendant.

The plaintiff sued out an attachment against N. T. Orr, which was levied in the hands of McBryde, who upon his garnishment, stated that he levied an execution upon N. T. Orr's property at the suit of the plaintiff, and raised from it the sum of $374 : 7½ above the amount required in the suit.

This sum was condemned in the Superior Court as liable to the plaintiff's attachment, and from that judgment M'Bryde, the garnishee, appealed to this court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the court.

The question presented on this record is,—whether the money in the hands of the sheriff, forming an excess beyond the amount of the execution, is liable to the plaintiff 's attachment? We are of opinion that it is liable to be attached, because it was held by the sheriff, not in his official capacity, but in his private character. He was directed by the writ of execution to raise the amount expressed in it, together with costs, out of N. T. Orr's property, [and to return that sum to court for the benefit of the plaintiff in the suit. It has been ruled, that money in a sheriff 's hands, raised by him in obedience to a writ, is not attachable; because it would interfere with the rights of others, embarrass, and sometimes render ineffectual, the process of the court, and produce endless litigation. But a surplus remaining in the sheriff 's hands, is the property of the defendant in the suit, who might immediately have demanded and enforced the payment of it; consequently, any of his creditors, in other respects entitled to the benefit of the attachment law, may levy upon it in the hands of the sheriff. The sum in con-

test is therefore condemned in the hands of McBryde, to satisfy the plaintiff's judgment.

NOTE—See *Alston* v *Clay*, 2 Hay. Rep. 171 and the note thereto.

BALLARD ET ALII *vs.* GRIFFIN—Page 258.

Where a person seized in fee prior to 1784 devised lands to his heir at law in tail, *it was held* that the heir took by purchase; that the act of 1784 (1 Rev. Stat. ch. 43. sec. 1) which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase; and that therefore when the devisee died leaving a brother and sister of the half blood in the maternal line, and more distant relatives in the paternal line, the former were entitled to the inheritance.

In this ejectment a special verdict was found, the substance of which is, that S. T. Everett being seized in fee of the first and second tracts of lands described in the declaration, devised to his only son, and heir at law, as follows:

"I give and bequeath, to my son James Everett, my manor plantation, and all the lands thereunto belonging, &c. to him and his heirs forever. It is my will and desire, that if my son James should die without heir, lawfully begotten of his body, then all I have given him shall belong to my brother John Everett, to him and his heirs forever."

That the testator died—and, afterwards, and subsequent to the year 1795, James died intestate and without issue; and that John died, in the lifetime of James, without issue; that he lessor of the plaintiff are the nephews and neices of S. T. Everett,—the heirs at law of John Everett,—and the heirs at law, on the paternal line, of James Everett. That the fourth tract of land was granted, by the State, to James Everett, who died seized of all the tracts, leaving a brother and two sisters of the half-blood, of the maternal line, under whom the defendant claims.

Daniel, for the lessors of the plaintiff, cited *Co. Litt.* 18. *b.* 1 *Strange* 277.

Gaston, for defendant, cited *Cro. Jac.* 695.—9 *East* 382. 2 *Ld. Raym.* 830.

TAYLOR, C. J. The material question on which the right decision of this cause depends, is, whether James Everett took the lands claimed in the declaration, by descent or purchase; for if he took them by descent, the heirs at law on the paternal line, who are the lessors of the plaintiff, are entitled to recover. If, on the other hand, James took them by purchase, his half-brother and sisters of the maternal line, under whom the defendant claims, are entitled to the inheritance.

We think it very clear that the words of the will create an estate tail in James Everett; for, although the first clause gives a fee, yet by the second, it is narrowed and restricted to an estate tail. The rule is, that if the devisor alter the estate, and limit it in a different manner from that in which it would have descended to the heir, the heir takes by purchase; because it is then another estate, which must descend from him, as the first purchaser, to his heirs on the part of his father.

It follows, therefore, that if a person seized in fee, devised lands to his eldest son in tail, the son, though heir at law, took by purchase; for it is a different estate from that which would have descended to him. This was undoubtedly the law of England, of course of this State, when this will took effect.—*Plowd.* 545. *b.*

But it has been argued for the plaintiff, that the act of 1784, which was subsequently passed, converted this estate-tail into a fee-simple, of which James became seized by operation of law, and without any act of his own; and, therefore, that he took the fee by descent.

He took the fee by force of the act of Assembly, but certainly not by descent from his father, for that was intercepted by the devise; he took, by the operation of the act, a new estate, with different qualities and incidents from his old one, and which could not have existed but for the previous estate devised under the will. The estate-tail was the *substratum* on which the fee was placed, and though it has larger capa-

cities, cannot boast a higher or more worthy origin. Whether an estate accrues by descent, or by purchase, must be decided when it first falls or is acquired. To ascertain its character by any circumstance arising *ex post facto*, would be inconsistent with the policy of the law, in relation to heirs who are liable to pay the debts of their ancestors, in virtue of lands coming to them by descent. It would involve the absurdity, that a person should take an estate by purchase, and continne to hold it a length of time without being liable as heir, during which period, all the suits against him, on the specialties of his ancestor, might be decided in his favor. But afterwards the construction of some act of Assembly is applied to his estate—it is touched by the wand of legal magic—not only its name but all its properties are changed—time, past, as well as present and future, yield to the enchantment, and the owner must pay those debts from which he has been once judicially exonerated.

To such a construction of the law we cannot yield. We believe that the estate-tail taken under the will, and the fee conferred by the act of 1784, were equally acquired by purchase, in the true sense of the word, and consequently that it descends to the brother and sisters of the half-blooded of James Everett.

Judgment for the defendant.

NOTE—See *Campbell* v *Heron*, Conf. Rep. 291, and the cases referred to in the note—see also *Burgwyn* v *Devereux*, 1 Iredell's Rep. 583.

McGEHEE *vs.* DRAUGHON AND JORDAN--Page 260.

To an action on the case against the defendants for negligently keeping their ferry, in which damages were laid at more than £100, they pleaded in abatement that the plaintiff lived in one county and they in another, and that the "matter in contest was not of the value of £50:" the plea is bad, for the words of the act of 1793 (1 Rev. Stat. ch. 31, sec. 42) are "debt or demand" and not "the matter in contest;" and further, the action is *ex delicto*, and therefore no one can say, before verdict, what the damages will be.

This is an action on the case, brought by the plaintiff against the defendants, for negligently keeping and managing their boat, kept by them, at their licensed ferry, for the transportation of persons and property across Cape Fear river, by which negligence the plaintiff sustained an injury by loss of property; and has laid his damages at one hundred pounds and upwards. The defendants pleaded in abatement, that the plaintiff is an inhabitant of the county of Person—that they, the defendants, are inhabitants of the county of Cumberland, and that the matter in contest is not of the value of fifty pounds. The plaintiff demurred to the plea, and the defendant joined in the demurrer.

The case was submitted.

TAYLOR, C. J., delivered the opinion of the court.

The plea in abatement cannot be supported—it is essentially defective both in form and substance. The words of the act of 1793, *C.* 18, are "any debt or demand," but the plea substitutes the words "the matter in contest." The plea is defective in substance, because the action arises *ex delicto*, and it is therefore impossible to ascertain the sum the plaintiff is entitled to, before the jury have assessed the damages. The sum demanded in the writ, is upwards of one hundred pounds, so that the plaintiff, living in a different district from the defendant, is *prima facie* entitled to sue where he lives, his demand being above that fixed by the act in such cases. But even if he should obtain a verdict for a less sum than fifty pounds, it would seem to be straining the interpre-

tation of the act, to suffer the jurisdiction of the Courts to depend upon a rule so uncertain and capricious, as the amount of damages in cases of *tort*. Let the plea be overruled and a *respondeas ouster* awarded.

DUNN *vs.* STONE.
POWELL *vs.* STONE—Page—251

For any of those acts, which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens: Hence, *it was held*, that an individual owning lands on a river where he was accustomed to take fish, could not maintain an action against one who built a mill dam across the river below him, whereby the passage of the fish up the river was obstructed.

The declarations in both these actions were the same. The substance of them was, that the plaintiff was possessed of a tract of land on the River Neuse, and a fishery adjoining it, from which he made great profits—that the defendant intending to injure him, erected a mill dam across the river, below the fishery, whereby fish are prevented from passing up the river, and the profits and advantages of his fishery are thus destroyed.

The defendant, by protestation, denies that the River Neuse, at the place where &c. is a navigable river, or that he has any knowledge of the plaintiff, his land or fishery, except that he is informed that Powell lives 15 miles above the dam, and Dunn miles above it; and, for plea, saith that he built the dam on his own land, for the purpose of giving him a head of water to turn mills and other machinery, and not with an intent to injure the plaintiff. Demurrer and joinder.

The cause was argued at a former term, by *Browne*, for the defendant, and at this term by *Nash* for the plaintiff.

For the plaintiff, were cited, Sir. John Davis's Rep. case

of the fishery of the Banne, 155.—F. N. B. 430.—4 Bar. 1364.

For the defendant, 5 Co. 72—Co. Litt. 56. a.—Cro. Eliz. 118.—1 Wils. 174. 2 Bl. Com. 35. Act of Assembly, 1787, C XV.

Taylor, C J. delivered the judgment of the Court.

It is to be decided whether an action can be sustained upon the facts stated in the declaration. The inconvenience occasioned to the plaintiff by the erection of the dam, is felt by him in common with all those, who own lands on the margin of the Neuse River, above the dam; and who, in consequence of such ownership, have been accustomed to take fish in the stream. This action cannot be supported without admitting, at the same time, the right of all such persons, even to the very source of the stream, to maintain similar actions. Their respective losses may vary in degree, but the principle of the action is equally applicable to them all; and if suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought, and thus lead to a severity of punishment utterly disproportioned to the offence, without affording to the public, that benefit, to which alone punishments can be legitimately directed.

The law, with admirable wisdom, has interposed an effectual barrier against so fruitful a source of litigation and injustice; and has separated, by well defined boundaries, injuries done to the public, from those done to an individual. Hence, for any of those acts which are in nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens; as if a man suffer an injury by falling into a ditch dug across a common highway, —Co. Litt. 56,—5 Rep. 73—or is thrown from his horse by means of logs laid across a highway,—*Carth.* 194—or receive any other special injury which is direct and not consequential. In all cases where the rights is of a public nature, the denial of the right to an individual is not actionable, unless the plaintiff charges in his declaration, and

proves a special damage ; as where an action was brught against the owner of a common ferry, for refusing to ferry the plaintiff over, who claimed a right by prescription to pass toll free, it was held not to lie, because the right was common—1 *Salk.* 12—and this proves too, that the objection to the action is not removed, by the act being more prejudicial to one man than another. Nor is it answered by shewing, that only a certain portion of the community, and not all the citizens, are incommoded by the act ; for that occurred in *Williams's* case, before cited from 5 C. 73 ; a reference to which will shew, that only the tenants of a particular manor could possibly receive any detriment from the neglect which was laid as the ground of the action.

It is true that the law enjoins upon every man, and will enforce in a suitable manner, that precept of natural justice, so to use his own as not to injure another. But the rule, in every instance, pre-supposes that the party complaining, has, in the thing injured, a property either absolute or qualified. The cases of injuring the dwelling, of obstructing lights, of exercising offensive trades, and the many others, stated in the books, are all founded upon this principle. But what property could plaintiff have in the fish, in their wild state before they ascended to the water flowing over his land? In animals *ferœ naturæ* a man may have a qualified property, which continues only while they are in his possession or under his controul; and so long they are under the protection of the law. But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own water, and thus have done an equal injury to the plaintiff's fishery. Whether their progress thither is obstructed by a mill dam, or by being taken in weirs or nets, the plaintiff loses the benefit of his fishery. But in both cases, the defendant is exercising a legal right, and certainly with as respectable and beneficial a motive in the case of erecting a dam, as in that of catching fish.

It would produce the most extensive mischief in society to sanction the principle, that a man may be sued for using a right, to the consequential and indirect damage of another.

Such a doctrine would unnerve all intellectual efforts in the advancement of science, arrest improvement in those arts, which diffuse around civilized man his chief comforts and highest ornaments; extinguish the lights of knowledge, and effectually check that spirit of useful discovery with which the present, more than any former age, has teemed, for the utility and embellishment of social life.

The frequent interference of the Legislature on the subject of fish, both in England and this State, impliedly recognizes common law right in the owners of the soil on both sides of the river, to exercise the property as they may think fit. Until the enactment of the law of 1787, C. XV, it was probably usual to build dams quite across some rivers, and entirely to obstruct the passage of fish: that act requires one fourth of the river to be left open for the passage of fish. The common law right has been restrained also by several other acts, relative to seine fisheries, all directed to promote the benefit of the public, at the expense of the individual owners of the rivers. A penalty is annexed to the violation of those laws, and the interest of the public seems, in general, to be well protected by them. The result of our consideration of this subject is, that there should be, in both actions, judgment for the defendant.

SEAWELL and CAMERON, Judges, gave no oponion, having been of counsel in these causes.

CLARK *vs.* McMILLAN—Page 265.

Where a defendant gave the plaintiff a writing not under seal, acknoweldging the sale of a note of hand and the receipt of part payment and that the balance was to be paid when the money was collected, *it was held* that the plaintiff could not prove by parol that the defendant, at the time of the contract, promised to commence an action within ten days against the maker of the note.

The defendant gave the plaintiff an instrument of writing,

signed by the defendant, but without seal; whereby he knowledged that he had sold to the plaintiff a certain note of hand, for which he had received part payment, and the balance was to be paid when the money was collected.

The plaintiff offered to prove, by parol, that at the time of the contract, the defendant promised to commence an action against the payers of the note, or one of them, within ten days from the first October, 1806—that, in fact, six months expired before the action was brought. And whether such evidence is admissible, is the question submitted to this court.

Taylor, C. J. delivered the opinion.

If the tendency of parol evidence is to contradict, vary, or add to a written instrument, it cannot be received; if to explain and elucidate it, it may be received. Upon the face of this writing there is nothing doubtful or equivocal. It states a simple transaction, and imposes no obligation upon the defendant; but the object of the evidence is to shew, that when he made the contract he entered into a stipulation, by which a duty was imposed upon him, for the breach of which this action was probably brought. This is in effect to prove by inferior evidence, that which purports, on the face of it to be a memorial of the defendant's contract, is in truth not so. Such evidence is inadmissible, according to all the authorities.

Note.—See acc. *Commissioners of Green* v *Holliday*,, 2 Hay. Rep. 384. *Hawkins* v *Hawkins*, ante. vol. 1, page 495. *Donaldson* v *Benton*, 4 Dev & Bat. Rep. 435.

WILLIAMS *vs.* LANE—Page 266.

Where a testator devised "to his grandson A. L. 350 acres of land, being the upper part of a tract of 700 acres; and to his grand daughters P. L. and J. L. the lower part of the same tract, to be equally divided between them," and the tract of land was found to contain in fact 1100 acres; *it was held* that the grandson A. L. was entitled to only 350 acres, and the grand-daughters to 375 acres each.

Describing a tract of land as containing a specific number of acres, is the same as the description of a tract, containing so many acres more or less.

This petition was filed by Williams and Patsey his wife, and Jane Lane, against Alfred Lane, in order to obtain the opinion of the Court, as to the manner and proportion, in which a division should be made between the parties, of a tract of land devised to them, by the will of T. Hunter, dec.

The case was spoken to at a former term by *Gaston* for the petitioners, and *Browne* for the defendant, when the court not having formed an unanimous opinion, it was continued under advisement till this term. The opinion of the court was now delivered by

CAMERON, J. In this case, the testator, Theophilus Hunter, devised as follows: "I give and bequeath to my grandchildren, by my daughter Jane, as follows, to wit:—to my grandson Alfred Lane, 350 acres of land, being the upper part of a tract of land of 700 acres purchased by me of Jas. Lane, lying on Crabtree Creek—Also, to my granddaughters Patsey Lane, and Jane Lane, I give and bequeath the lower part of the same tract of land, to be equally divided between them."

The tract contains, by actual survey, 1100 acres of land, and the question is, whether the defendant is entitled to 350 acres, being the upper part of the tract, or to one half of the tract?

The meaning of the testator is always to prevail, when it can be fairly inferred from the words he has used, and when it does not contravene any known or established rule of law. It does not follow, because the testator describes the tract in

question, as a tract of 700 acres, and devises to the defendant 350 acres, being the upper part of the same, that he intended to give him one half of the tract. Suppose the tract only contained 500 acres, could the court say that the testator only intended that the defendant should have 250 acres, when he has expressly and specifically devised to him 350 acres?—We apprehend not.

It was decided in the case of *Powel* v *Liles*, in this court, that describing a tract of land, as containing a specfic number of acres, did not vary the case from a description of a tract by so many acres, more or less. If the testator had described the tract to be 700 acrese, more or less, no question could have been raised. In our opinion, the words he has used mean nothing more than if he said 700 acres, more or less. Wherefore, a majority of the court are of opinion, that the defendant, Alfred Lane, is entitled under the will of the said Theophilus Hunter, to 350 acres of land to be taken from the upper part of the aforesaid tract, and that the petitioners are entitled to have the residue of said land divided between them equally.

Taylor, C. J, I have formed a different opinion from that which has been pronounced, and will briefly state the reasons upon which it is founded. The intention of the testator seems to me apparent, upon the face of the will, to give his grandson Alfred, one half the tract of land, and the other half to be equally divided between his two granddaughters —and in this proportion he meant they should take, whatever number of acres the tract should be found to contain.

The testator believed that there were 700 acres in the tract, for in that way he described it—and under this belief he gives to Alfred that number of acres which amounts to half, describing it as the upper part. This induces me to think that he used the word "part" as synonymous to "half." But why is he silent as to the number of acres he devises to his granddaughters? For the obvious reason, that it was one half the tract and must be the same in quantity that he had just given to Alfred. It had been twice told, and required not a repetition. He assigns one clause to the devise

to Alfred; and a new, and separate one, to the divise to his two granddaughters—to the end, that the words "equally to be divided" might have a distinct and unequivocal reference to them, and to preclude any refinement of construction, which might also extend to Alfred and his half.

This would have been the undoubted construction of the will, if the tract of land had in reality contained the exact quantity of acres, which the testator believed it did. The intention would then have been considered clear, and the phraseology perspicuous. I cannot understand why this construction should be abandoned, because it happens in event that the tract contains 1100 acres. There is no revolting disproportion in the shares of the respective grandchildren; no ratio different from that which the testator himself designed. It is certain that each devisee would receive more than the testator expected, but they would receive it in the exact proportion that he designed and limited; inasmuch as 350 bears the same proportion to 175, that 550 does to 275. Yet how different is the result according to the judgment! Alfred's share instead of being equal to the shares of both his sisters added together, will be less than the share of either. If this question had been put to the testator,—"suppose there should be much more land in this tract than you think there is, do you intend in any even that your granddaughters shall, each, have more than your grandson?—I think he would have been very prompt in answering "No; I gave 350 to Alfred because I believe the tract contains 700, and I wish him to have half at all events, and the other half to be divided between his sisters."

As I take this to be the true construction, I cannot consent to yield it on account of a mistake in the testator as to quantity; a mere error in computation, which has been so often overlooked when the intentionis plain. 1 *Vesey* 106. *Milner* v *Milner*, 2 Bro. C. C. 87. *Williams* v *Williams*. "If (says Lord Bacon) I grant my meadows in Dale containing 10 acres; and they in truth contain 20, the whole 20 pass" according to the maxim *veritas nominis tollit errorem demonstrationis*. *Reg.* 25. If half the meadows

had been granted in the same way, the grantee must have taken 10 acres; and I cannot perceive a difference between those cases; and where a man grants to A five acres, being the upper part of his meadows containing ten acres; and in another clause grants the lower part of the same meadows to be divided between B and C.

SEAWELL, dissented from the opinion of the court.

NOTE—See *Powell* v *Liles*, 1 Murph. Rep. 348. *Proctor* v *Pool*, 4 Dev. Rep. 374. *Dodson* v *Green*, Ibid 491.

STATE *vs.* BRYANT—Page 269.

An indictment, which charges a person with stealing a thing destitute of both intrinsic and artificial value, cannot be supported; therefore an indictment was quashed which charged a person with larceny in stealing "one half ten shilling bill of the currency of the State."

This case came before the court on a motion to quash the indictment, which charged the defendant with petty larceny, in stealing *one half ten shilling bill of the currency of the State, &c.*

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the court.

The thing charged to be stolen is not stated with the requisite precision and distinctness, to authorise the court to pronounce judgment upon the offence, in the event of a conviction. Considered as currency of the State, it is of no value, since no one is compelable to receive it; it is not a tender in payment. Nor could the defendant, by the description in this indictment, protect himself from a future prosecution for the same larceny. As it is actually described, there is no such thing known in the currency of the State; as it was probably meant to be described, it is not punishable as a larceny. Being therefore destitute alike of artificial and intrinsic value, the indictment cannot be supported.

Let it be quashed.

STATE *vs.* LEVIN, A SLAVE--Page 270.

The punishment of a slave for horse stealing is whipping and loss of ears for the first offence, and death for the second under the act of 1741, c. 8, sec. 10, the subsequent acts prescribing the punishment of horse stealing not extending to slaves.

The defendant is a negro slave, the property of William Pope. He was convicted of stealing a horse, the property of Zeno Worth—and it is referred to the Supreme Court to determine what judgment should be rendered against him.

TAYLOR, C. J., delivered the opinion of the court.

The first time the offence of horse-stealing by a slave, appears to have been noticed by the Legislature, was in 1741, when, for the first offence, the punishment of whipping and the loss of ears was annexed to it; and for the second offence, death. C. 8, § 10. At this period the benefit of clergy was taken away from the offence, generaliy, by several statutes—Ed. VI, & 31 Eliz. C. 11—so that it must have been a capital crime in free persons: how long it continued so, we have not the means of immediately ascertatning, nor is it essential—it was so in 1779, because, in the private acts for that year, there is a pardon granted to a person under sentence of death for the offence. Shortly after the latter period, it is probable that the law underwent some change because in 1784, an act was passed to prevent horse-stealing, only the title of which is preserved in the collection of the acts of Assembly. But it was repealed by an act in 1786, from the preamble of which, it may be collected, that the act repealed, introduced the punishment of death; and the purview of this act substitutes the punishment of pillory, &c. Thus it continued till 1790, when the punishment of death was again introduced and has remained ever since. But all these acts subsequent to 1741 relate to the crime as committed by free persons, and do not interfere with its punishment when committed by slaves. It then follows that the judgment in this case must be pronounced under the 10th section of the act of 1741, Cap. VIII.

NOTE.—See 1 Rev. Stat. ch. 34, sec, 15.

BULLOCK *vs.* TINNEN AND WIFE—Page 271.

Delivery is necessary to complete the gift of a chattel, unless it be granted by deed or is incapable of delivery; therefore, where a father, the day after the death of his son, relinquished to his son's widow all the right which he had to a distributive share of his son's estate, but without deed or delivery, and in the absence of the widow, *it was held* that the father might still recover such distributive share.

The complainant, Micajah Bullock, exhibited his bill against Nancy Bullock, (who afterwards intermarried with the defendant Carns Tinnen,) as administratrix of her husband, Philip Bullock, charging that said Philip died intestate and without any children—that the complainant was entitled, as the representative and next of kin, to two thirds of the estate of said intestate, in the hands of the said defendant—and charged, that negro woman Betty and her children Jenny, Jordan, Davy and Leathy, with other property, came to the hands of said defendants. To which bill the said Nancy, before her intermarriage, filed an answer, admitting that her husband and intestate Philip, died on the 17th November, 1807—that the negro woman Betty and her children, Jenny, Jordan, Davy and Leathy, with other property, came to her possession, but alleges, that on the day after the death of said Philip, the said Micajah did fully, freely, wholly and absolutely reliquish and yield up to this defendant, all the right and interest which he had, or might have, to any part of his said son's estate, by reason of his having died intestate. Whereupon the following issue was made—Did the complainant, after the death of the intestate, yield and relinquish to the defendant, all his right and interest in the intestate's estate—if any, what part thereof, and what relinquishment did he make? If he did, upon what consideration, and whether by parol or writing, and at what time?—Whereupon the jury returned the following verdict—That on the 19th day of November, 1807, the complainant, Micajah Bullock, did yield and relinquish to the defendant, a

certain negro woman by the name of Betty, and her children—that the consideration that influenced that relinquishment, was the love and affection the complainant had to the defendant Nancy Tinnen, (then Nancy Bullock;) and further—that the relinquishment was made by parol, on the day aforesaid, and that the said Nancy, then Nancy Bullock, was not present.

Upon motion to dismiss the bill, as seeks distribution of Betty and her children, it is referred to the Supreme Court to determine and adjudge what decree shall be made.

The case was argued by *Browne* and *Norwood* for the complainant, and *Nash* for the defendant.

Taylor, C. J. delivered the opinion of the court.

Whatever wishes the circumstances of this case may be fitted to inspire, the court are not apprised of any authority or principle of law, by which the transaction between Bullock and his daughter-in-law can be supported.

The delivery of possession has ever been deemed necessary to complete the gift of chattels, except they are granted by deed, or are incapable of being delivered." "Every thing that is not given by delivery of hands, must be passed by deed. The right of a thing, real or personal, may not be given in nor released by word."—*Noy. maxim* 33. If the gift does not take effect, by the delivery of immediate possession, it is then not a gift but a contract, the performance of which can only be compelled upon good and valuable consideration. 2 Bl. 442. It has even been held that if a man, without consideration, deliver a thing to another to be given to a third person, he may countermand it at any time before delivery over. Dyer 49.

The rule of the civil law appears to have been less strict, with respect to gifts, than the common law; but though it did not require a delivery, the presence of the party, to whom the gift was made, was deemed essential. It substituted, besides, other ceremonies, which were perhaps as well calculated to make the transaction public, and to guard against haste and imposition, as those required by our law. It is the object of all laws to enforce the performance of those con-

tracts and engagements which grow out of the relations and state of society; and the ceremonies requisite to their validity are designed to fix and ascertain the intention of parties, and the degree in which they mean to incur a legal responsibility. No man who deliberately makes a promise, can in morality or honor, recede from the performance of it, without very sufficient reason; but the law lends its aid in compelling the performance of those engagements only, which are contracted under prescribed ceremonies, and evidenced by certain proofs of deliberation. A man may have a present intention to do a thing, or may intend to do it in future, and express himself to that effect, without meaning at the time, to lay himself under a legal obligation. And it may well be doubted whether it would be wise, if it were practicable, to give legal effect to those promises which are made without due delibration, or under the influence of some strong emotion, the presence of which, in a greater or less degree, interrupts the calm decisions of the judgment:—whether the heart abandon itself to the transports of joy, or is weakened by the sympathy of grief, something is deducted from the prudence and circumspection which the mind exercises in the ordinary concerns of life. The court overruled the motion to dismiss the bill.

Note.—See *Arrington* v *Arringtan*, 1 Hay. Rep. 1, and the note thereto—also *Picot* v *Sanderson*, 1 Dev. Rep. 309.

SQUIRES *vs.* RIGGS—Page 274.

A prior voluntary conveyance of land, shall prevail against that of a subsequent purchaser, unless the latter is fair and honest. Hence where A. in consideration of blood and affection, conveyed his lands to his only son, and afterwards for a valuable consideration sold the same land to B.; but with the intention of defrauding his creditors, *it was held* that the son was entitled to recover from one who purchased of B. with notice of the circumstances.

R. Squires made a conveyance, in consideration of blood

only, to his child, the lessor of the plaintiff, by deed. Afterwards, R. Squires, by deed, for valuable consideration, conveyed the lands to William Jones—but such conveyance was not *bona fide*, being made with the intention of removing the land from the reach of the creditors of Squires—Jones conveyed to John Riggs, for a valuable consideration, who had notice of the circumstances under which Jones received his conveyance. The defendant holds under Riggs.

The jury, upon these facts, found a verdict in favor of the plaintiff,—and a motion is made for a new trial upon the ground, that the verdict is contrary to law.

The case was argued by *Donnell* for the plaintiff and *Gaston* for the defendant.

Taylor, C. J. delivered the opinion of the court.

The statutes relative to fraudulent conveyances, have, from the periods of their enactment, received that construction which appeared most likely to suppress deceitful practices, and to obviate all temptation to commit them. And the principle arising in this case, was brought under the notice of the court at a very early period after the passing of 27 Eliz. when such a decision was made as might have been expected from the spirit and policy of the statute; for it would seem strange that a person setting up a title, which bore upon its face the character of iniquity, and was avowedly designed to defraud creditors, should shelter himself under a law, the very design of which was to frustrate and discountenance all such attempts. Accordingly it has been held in every case, in which the question has occurred, not only that a purchaser must have paid a valuable consideration, but that the transaction must be fair and honest; and although it is not possible, perhaps, to find a case where the purchase was made precisely with the same view, viz. to defraud the creditors, as in the case before us, yet the *bona fides* is required as indispensable; for it surely cannot make any difference in principle, whether the transaction, if it be really corrupt, receive its impurity from one source or another. There is a case cited in *Twynes'* case 3 Co. which lays down the law in very explicit language. A person hav-

ing made a voluntary conveyance of his lands, afterwards being seduced by deceitful covenous persons, for a small sum of money, bargained and sold his land, being of a great value. This bargain, though it was for money, was holden out of the statute, which being made against fraud does not help a purchaser who does not come to the land for a good consideration, lawful and without fraud and deceit. Though this case does not involve the rights of creditors, yet it may fairly be considered a direct authority for the principle, that a prior voluntary conveyance shall not give way to a subsequent purchaser who has conducted himself dishonestly. It is, in effect, giving to the word purchaser, under the statute, the same meaning which is affixed to it in Courts of Equity, as one who innocently and without fraud or surprise, for valuable consideration, acquires a right or interest. The cases in Cro. Eliz. 445, and 1 Bur. 396, are to the same effect. In the last case that is recollected, where the same question has occurred, the language of the court is particularly strong. The amount of it is, that a purchaser is not entitled to the protection of the statute, unless the transaction is *bona fide* and the purchase fair in the understanding of mankind. It is not necessary that it should be for money, but it must be fair: if it is colourable only it cannot stand. Cowp. 705.

Upon the whole we think the plaintiff entitled to judgment upon the reason of the thing, the policy of all the statutes and acts concerning fraud, and the unvarying exposition they have received in respect to the point of this case.

Judgment for the plaintiff.

NOTE—See *Martin* v *Cowles*, 1 Dev. & Bat. Rep. 29. *Fullenwider* v *Roberts*, 4 Dev. & Bat. Rep. 278.

HARTON AND WIFE *vs.* REAVIS—Page 276.

In an action for slander the court may grant a new trial after a verdict for defendant, if in the opinion of the Judge the evidence authorised a verdict for the plaintiff with exemplary damages.

This was an action of slander, to which the defendant pleaded "general issue, justification and statute of limitation."

Upon the trial the plaintiff proved, satisfactorily, and clearly to the Court, the speaking of the words, and within six-months before the commencement of the action.

The defendant attempted to prove justification, in which, in the opinion of the court, he wholly failed—and the plaintiff, in the opinion of the Court, was entitled to exemplary damages.

One of the jurors was called by defendant, as to the time of speaking the words, who, in the opinion of the court, from other evidence, was clearly mistaken in his evidence.

The jury found that the action was not commenced within six months of the speaking of the words, and upon a motion for a new trial, the point is referred to the Supreme Court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the court.

We entertained some doubts on first reading this case, whether it was competent in the court to award a new trial, but not finding, upon examination of the authorities, any that can justly be considered as opposing it, and the reason and justice of the thing being clearly the other way, we think the case ought to be submitted to the consideration of another jury. It is very difficult to lay down any general rule on this subject, on account of the numerous exceptions which the every varying circumstances of cases continually furnish, which must, after all, influence the legal discretion of the court, as directed to the furtherance of justice. The

practice of the courts in Westminster-Hall has been gradually acquiring liberality, in granting new trials, in cases of tort, where the damages are excessive. In the case of *Beardmore* v *Carrington*, 2 Wils. 2144, it was said there was no case to be found where the court had granted a new trial for excessive damages in a case of tort; and though the power of doing so was not denied, yet it was said it ought not to be exercised, but in flagrant and extreme cases. In *Dubberly* v *Gunning*, 4 Term Rep. 651, which was an action of *crim. con.* the court refused to grant a new trial, although they thought the damages excessive. But in an action of assault and battery, which occurred soon afterwards, they granted a new trial for excessive damages, saying that the case of *Dubberly* v *Gunning* was *sui generis*, and that the court were not unanimous. 5 Term 257. And there are several cases where, though the court refused a new trial, they admitted their power to grant it, if the damages had been greatly disproportionate to the injury received. 3 Bur. 1845, 2 Bl. 184. It would appear from these authorities, that the court have power to interfere in all cases of tort, except *crim. con.* respecting which, a notion prevailed that the jury were the uncontrolable judges of the damages, as they were given for wounded feelings, and the loss of happiness, the extent of which, only the jury could estimate. This exception, however, seems no longer to exist, for in a late case it is said, that if it appeared from the amount of the damages, as compared with the facts laid before the jury, that the jury acted under the influence, either of undue motives, or some gross error or misconception of the subject, it would be the duty of the court to grant a new trial.—6 East 256.

There is a dictum of Lord Holt's cited in Comyn's Pleader, R. 17, that a new trial is not usually granted in an action of slander. The case appears, by the report in Salkeld, to have occurred 8 Wil. 3, and as the same thing is said by the same Judge, at other times, it was probably the law and practice of that day. Holt's Rep. 704. But in a case that occurred about forty-three years afterwards, on a motion to

set aside a verdict, on account of the smallness of the damages in an action of slander, the court state that verdicts had been frequently set aside for excessive damages, but they knew of no precedent for setting them aside for the other cause, though they acknowledge the reason to be equally strong in both cases. Barnes, 445. And it may be inferred from subsequent decisions, that these actions were governed by the same principles with all other actions of tort, with respect to new trials. In an action for words, which were fully proved, the jury found a verdict for the defendant. On a motion for a new trial, Lord Mansfield, who tried the cause, reported that he expected a verdict for plaintiff, *but with very small damages*, as the words were spoken in heat and passion, and never afterwards repeated. The Court, without adverting to any rule applicable to the particular action, and restraining the exercise of their discretion, said they would not grant a new trial for the sake of sixpence damages; in mercy to the plaintiff, as well as the defendant. 2 Bl. Rep. 851. In another case still later, where the jury had found for the defendant in an action for a libel, but which the Judge reported to be against evidence, but that the injury done the plaintiff was so very inconsiderable, that he should have thought half a crown, or even a much smaller sum, to have been sufficient damages, the court overruled the motion for a new trial; saying they ought not to interfere, merely to give the plaintiff an opportunity of harrassing the defendant at a great expence to himself, where there has been no real damage, and where the injury is so trivial as not to deserve above half a crown compensation. The court also advert to the cause of action being in the nature of a crime, and its being indictable. *Burton* v *Thompson*, 2 Burr. 664.

The unavoidable inference from these cases is, that if there existed any principle or usage, restrictive of the power of the court to award a new trial in actions of slander, either for smallness of damages, or because the defendant had been acquitted, such rule would have formed the ground of decis-

ion—it would have been a decisive answer to the application for a new trial, and rendered a discussion of the merits altogether irrelevant.

And it may, with equal probability, be added, that if the cases had presented a positive injury sustained by the plaintiff, and a finding of the jury against evidence, the verdicts would both have been set aside, in order that justice might have been done; for it cannot be called ministering to the passions of a man, to furnish an opportunity of procuring legal redress to him, upon whose character a deep wound has been inflicted. In the case before us, the damages ought, in the opinion of the Judge who tried the cause, to have been exemplary,—and the verdict was against evidence. We therefore think a new trial should be awarded.

DARDEN'S HEIRS *vs.* SKINNER—Page 279.

Inadequacy of consideration, embarrassed circumstances in the grantor, his remaining in possession of the lands after the sale, the secrecy of the transaction form a combination of presumptions indicative of fraud.

This was a bill in equity praying to be let in to the redemption of certain premises conveyed by a deed, absolute on its face, but which charged to have been procured so to be made by fraud and stratagem. The defendant claiming as devisee from grantee, denied all knowledge of the transaction, but admitted he was administrator *de bonis non* of the grantee, amongst whose papers he had found a bond for £174, given by the ancestor of the complainants, and bearing date a short time before the date of the deed. The defendant further alleged in his answer, that if there was any trust between the parties to the deed, it was created with a view to defraud the grantor's creditors.

Upon this case two issues were submitted to the jury. 1. whether the deed was intended to be an absolute one or a

mortgage. 2. Whether the intent was to defraud Darden's creditors.

It appeared in evidence, that the land was worth five dollars per acre, that it was listed for three hundred acres, but the witness who had lived upon it, and was acquainted with the boundaries, believed there was not more than one hundred and seventy five acres.

The consideration of the deed was five hundred pounds, and it appeared that about the date of it, the grantor was much embarrassed in his circumstances; and that shortly afterwards all his property was taken in execution and advertised for sale, which was forbidden by the grantee, who produced the deed: all the other property was then sold, except the land, but was insufficient for the payment of the debts. The grantor remained in possession of the land during his lifetime, from 1793 to 1798.

The verdict of the jury was, that the land was mortgaged, and that the deed was not intended to defraud creditors. On a motion for a new trial, the case was submitted to this court.

TAYLOR, C. J. delivered the opinion.

Every part of the evidence upon which the jury founded their verdict, tends strongly to establish, that the transaction between Darden and the defendant's intestate was fraudulent. The embarrassed condition of the former when the deed was made—his remaining in possession of the land continually till his death—the secrecy of the transaction, of which there is no proof that it was made public, till the exigency of Darden's affairs required Skinner to come forward and save the land from being sold—and the inadequacy of the consideration, if indeed there was any paid, the only proof being that a bond of £174 was found amongst Skinner's papers, whereas the lowest value of the land was upwards of £800,—are all circumstances which would probably exist in a scheme to defraud Darden's creditors, but are not easily reconcileable with a fair sale to Skinner, or even with a *bona fide* mortgage to secure the payment of a just debt.

The court have no hesitation in awarding a new trial of the issues.

NOTE.—See *Hodges* v *Blount*, 1 Hay. Rep. 414, and the cases there referred to in the note, and *Ingles* v *Donaldson* 2 Hay. Rep. 57, and the cases there referred to in the note on the question of fraud.

LENOX *vs.* GREENE ET ALII—Page 281.

The lapse of fifteen years, unaccompanied by other weighty circumstances, is not sufficient to raise the presumption of the payment of a judgment.

Presumptive evidence ought not to be erected on surmise, and especially against a record, but on a solid foundation, and is only created when the circumstances are such as to render the opposite supposition improbable; it ought also to be stronger to defeat a right, than to support it; and the facts, from which a presumption is deduced, ought to be consistent with the proposition they are intended to establish.

This was an appeal from the decision of the Superior Court of Craven, overruling a motion for a new trial made by the plaintiff, on the following grounds, viz. a verdict against evidence, without evidence, and an eroneous charge of the Court.

This action was brought against the defendants as sureties of William Henry, Sheriff of Craven County for breach of his official bond. On the plea of performance, the issue to be decided, turned wholly on the fact,—Whether a judgment recovered by John Lenox against Benjamin Williams, and which had been collected by Henry, under execution, had been paid to Lenox or not? The judgment of Lenox against Williams was for one hundred pounds in an action of assault and battery.

The execution issued from Salisbury Superior Court, tested the 2d October, 1793, and was returnable to the 19th March, 1794. On this execution the sheriff made two returns, which were in the following words, viz.

"Satisfied in full. *Wm. Henry*, Sheriff." "Also—"Judgment paid plaintiff. *Wm. Henry*, Sheriff."

The defendant produced a receipt in the following words:

"Received of William Henry, Esq. Sheriff of Craven county, £51 11s 2d, by the hands of William Slade, in full, for the costs of a suit recovered in Salisbury Superior Court at the instance of John Lenox against Benjamin Williams, Esq. together with the execution issued on said suit.

"*Montford Stokes*, Clk. Sup. Court Law.

"Newbern, 20th July, 1794."

William Henry died in the fall of 1799. No demand was shewn to have been made by Lenox until the fall of 1809, when a claim was preferred against the securities, and in the June following the present suit was brought. John Lenox has been, since 1794, and yet is, a resident of Rockingham County. The defendants are residents of Craven county. Montford Stokes was at Newbern, in Craven county, at the date of the receipt, as a clerk of the State Legislature, then sitting at Newbern.

The court instructed the jury that they were at liberty to presume, from the lapse of time, and the circumstances herein stated, that the judgment was paid—And the jury found a verdict accordingly.

The cause was argued by *Gaston* for the plaintiff, and *Mordecai* for the defendants.

Taylor, C. J. delivered the opinion of a majority of the court.

The jury have presumed a payment of this judgment after a lapse of something more than fifteen years, of which Henry, the sheriff, was alive only about five; and in aid of the presumption, arising from length of time, other circumstances are relied upon, as that Henry returned the execution, with two indorsements, one of which stated, that it was satisfied in full, the other, that he had paid the amount of the judgment to the plaintiff. In addition to these circumstances, the defendants relied upon a receipt, signed by the clerk of Salisbury Superior Court, for the amount of the costs,—upon the non-production of proof by the plaintiff, of

any demand made by him till the Fall of 1809, and upon the fact of his residence in Rockingham County since 1794, and the defendants' in Craven County. It also appears that the Clerk of Salisbury Superior Court was in Newbern, at the period his receipt bears date.

These circumstances, it is said, fortify and support the presumption arising from the length of time, (which is admitted not to be alone sufficient) and completely justify the finding of the jury.

But we do not perceive in any of these circumstances, taken singly, nor in all of them together, that weight and conclusiveness, which ought to exist, before a man is deprived of a debt due by the high evidence of a record.

Presumptive evidence ought not to rest upon conjecture and surmise—it must be built on a solid foundation A legal presumption does not arise because probability preponderates on one side, rather than on the other—it is created only then, when the circumstances are such, as to render the opposite supposition improbable; and when we are about to defeat a right, the presumption ought to be stronger, than when it is to be supported.—*Cowper* 216.

The sheriff's return is his own act, and considered as evidence *per se*, it cannot be introduced in favor of himself or his securities—it is evidence only against them. It might, in connection with other circumstances, become evidence against the plaintiff—if, for example, he had seen it a long time since and acquiesced in it, it might be supposed that he knew its truth. But this important fact, instead of being proved, is supposed—this essential link in the chain of circumstances is deficient. But why should it be supposed that the plaintiff saw this return? The time when he would most probably have looked for the execution was, when it was returnable, and ought to have been returned. That was at March Term, 1794, but instead of being returned then, it was delivered to the Clerk at Newbern, in July, 1794, as appears by his receipt. And even if the return had been made in due time, the probability of its having come to the knowledge of the plaintiff, must depend upon many circum-

stances, not proved, and which the jury had no means of ascertaining,—upon the degree of attention usually paid by the plaintiff, to his affairs, upon his condition, wants, and vigilance.

The facts from which a presumption is deduced, ought to be consistent with the proposition which they are intended to establish. Here the proposition intended to be maintained is, that Henry paid the plaintiff his debt—but a fact proved is, that he did not pay the costs, an incident to the debt, when they ought to have been paid; and then not at Salisbury, but at Newbern, where the Clerk personally met him. Now, if the effect of a presumption, in serving as a proof, depends on the justness of the consequences, drawn from certain facts, to prove others which are in dispute, should we not lose sight of the principle, in presuming punctuality in that part of a transaction which we *cannot* see, when we are furnished with positive proof of delinquency in that part which we *do* see? As, therefore, we are not apprised of any adjudication where the jury have been left to presume payment even of a bond, after the lapse only of fifteen years; and as the circumstances here proved do not, in our conception, aid the time, we think a new trial should be granted.

HENDERSON, J. I do not concur in the opinion of the court. It is not contended by me, that a presumption of payment arises, short of a period of twenty years, where there were no circumstances to aid the presumption; but if there were, it was properly left to the jury to presume a payment, although twenty years had not elapsed. It was the province of the court to see that those circumstances were relevant,—and of the jury, to give them their due weight;—and the court, in this case, can grant a new trial, only in case the court or jury erred in discharging their respective duties. That the plaintiff caused an execution to issue—that the execution was returned with an indorsement of satisfaction, and the money paid to the plaintiff—that the plaintiff lived not more than seventy miles from Salisbury, where the execution was returned—that he took no further steps during the life of the sheriff, to enforce the payment—

that the sheriff died in the year ,—were, certainly, all relevant circumstances. That the plaintiff had a knowledge of the return of the execution, or that the return was true, was a fair inference made by the jury; for we can scarcely believe, that a man who had prosecuted an action to judgment, and recovered one hundred pounds, and caused an execution to issue, and to be delivered to the sheriff at the distance of two hundred miles, would, at once, remit his exertions and abandon his claim for fifteen years—so, take it either way, it affords a strong presumption that the sheriff's return was true. It is farther observable, that the execution was returned to the court of the district in which the plaintiff continued to reside. It is said that this is permitting the sheriff to create evidence for himself; but it is not the sheriff's act, but the conduct of the defendant, which raises the presumption—it is like an assertion, made in the presence of a man, of a fact within his knowledge, and affecting his interest, and not contradicted by him. There are other circumstances in the case, but I deem those already mentioned sufficient. I therefore think it not barely such a verdict as ought not to be disturbed, but such as the law and justice of the case require.

NOTE.—By the act of 1826 (1 Rev. Stat. ch. 65, sec. 13) the presumption of the payment or satisfaction of a judgment shall arise after ten years. See *Johnson* v *England*, 4 Dev. & Bat. Rep. 70.

WILLIAMS AND WIFE *vs.* HOLLY—Page 286.

Where a testator devised lands to his "daughter A. B. to her and her husband during each of their lives, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heir: to that and its heirs forever, otherwise to return to my heirs at law and their heirs forever;" it was held that the limitation came within the rule in *Shelly's case*, and that upon the death of the husband, the land survived to the wife in fee.

Nathaniel Holly being seised in fee of the premises in question, devised them in the following words:

"I give and bequeath to my daughter *Ann Britt*, one hundred and twenty-five acres, whereon she and her husband now live, to she and her husband during each of their lifetime, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heir, to that and its heirs forever, otherwise, to return to my heirs at law and their heirs forever."

The testator died in 1780. The husband had issue by his wife, which issue died in 1788; the husband died in 1790, living his wife, who, in 1804, devised the land to the lessors of the plaintiff.

The preceding facts were admitted in a case agreed, sent to this court and submitted without argument.

TAYLOR, C. J. delivered the opinion of the court.

The court do not perceive any circumstance in the character of this devise, which ought to prevent the direct application of the rule in *Shelly's* case, that where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases, *the heirs* are words of limitation and not words of purchase.

In cases like this, where there is no intermediate estate, the remainder is executed in the ancestor, and as both estates are of the same quality, viz. legal, they unite and coalesce.

It is said in Co. Litt. 183, b. 184, that where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee simple to them, as an estate to A & B, or for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality that is, both joint, the fee rests in them jointly. And so if the limitation of the freehold be to husband and wife jointly, remainder to the heirs of their bodies, it is an estate-tail executed in them, as they are capable of issue, to whom such joint inheritance can descend. In this case the limitation of the freehold is joint to Britt and his wife, and is followed by a joint limitation of the inheritance. Upon the death of the husband it survived to the wife, who thus became seised in fee, and consequently had a right to devise the land to the lessor of plaintiff, for whom there must be judgment.

NOTE.—See *Ham* v *Ham*, 1 Dev. & Bat. Eq. Rep. 598. *Payne* v *Sale* 2 Dev. & Bat. Eq. Rep. 455.

STATE *vs.* McENTIRE——Page 287.

If upon an arraignment for murder the prisoner pleads in chief and is convicted, the judgment shall not be arrested because the venire returned to the Superior Court consisted of forty jurors instead of thirty, nor because one of the grand jurors was on the coroner's inquest.

Nor will it be arrested because it does not appear, on the face of the proceedings, that the bill was fonnd upon evidence under oath, or that any witness was sworn and sent to the grand jury.

An indictment was found against the defendant, in the Superior Court of Rutherford county, for the murder of Larkin Dycus, and was transmitted for trial, to Lincoln Superior Court, upon an affidavit filed by the Solicitor. The defendant was found guilty, and upon being brought up to receive judgment, the following reasons, in arrest, were offered by his counsel.

1. That the County Court of Rutherford had returned to the Superior Court of the same county, forty jurors as a *venire*, whereas they had authority by law to return only thirty; and that the grand jury, who found the bill, were composed out of the *venire* so improperly returned.

2. That John Hardcastle was a juror on the coroner's inquest, and also one of the grand jury, by whom the bill was found.

3. That the transcript sent from one court to the other, does not shew that the bill was either found upon evidence under oath, or that any witness was sworn and sent to the grand jury.

The case was argued by *Wilson* for the State, and *Murphey* for the prisoner. For the former, were cited, Bac. Abr. Tit. Jurors A. Jones 198—for the prisoner, 3 Inst. 33, Cro. Car. 134.

Taylor, C. J. delivered the judgment of the court.

The act of Assembly specifies the number of jurors which shall be returned to the Superior Courts, and is directory to the County Courts in that respect; but is wholly silent as to the legal effect of returning a great number. We must, therefore, have recourse to those principles of construction, and modes of proceeding, which have always been applicable to analogous cases; and none can be more strictly so, than when there have been causes of challenge, either to the array or the polls, which the party indicted did not avail himself of upon his arraignment, but withheld to a subsequent stage of the proceeding. Such instances have often occurred in the practice of this State, and the decisions, as far as they are known or remembered, have uniformly overruled the objections, upon the principle that where the law has given the party a full opportunity of bringing forward his objections, and ascertained the period when they shall be disclosed, he ought not to be heard at a future time.

The extent of this principle, the justice and necessity of its observance, and the decisive application it has to many branches of the law, may be illustrated by various examples; as in challenges, he who has several must take them all at

once—after one hath taken a challenge to the polls, he cannot challenge the array. Co. Litt. 58. If a party has a cause of challenge which he knows of before trial, and does not take it, he shall not have a new trial. 11 Mod. 119. In pleading, if the defendant plead to the writ, he loses the benefit of a plea to the person. Ibid 303, *a.* In the trial of right, after money has been paid under legal process, it cannot be recovered back again, however unconscientiously retained by the defendant. 7 Term 269. 2 H. Bl. 414. The statute of West. 2 C. 1 enacts, that all fines contrary to that act, shall be null, yet it has been construed to mean only voidable, by some legal proceeding. 4 Term 600.

With respect to the qualification of jurors, the statute West. 2 C. 38, directs the sheriff not to summon men who are sick, aged, or not dwelling within the county. Yet, if they were summoned, and did appear, they could not be challenged by the party, nor could they excuse themselves from not serving, unless there were enough without them—2 Inst. 448—though certainly these were as unlawful jurors, as the number above thirty, in the present case.

But the statute of 11 H. 4, C. 9, after prescribing the qualification of jurors, and the manner of their return, expressly declares that indictments, found by persons disqualified in the statute, shall be void. The strong expressions are, "that the same indictment so made, with all the dependance thereof, be revoked, annulled, void, and holden for none forever." It has been observed by Lord Coke, that the safest way for the party indicted is, to plead, upon his arraignment, the special matter given him by this statute, for the overthrow of the indictment, with such averments as are by law required, and to plead over to the felony. For this he cites Brooke's Abridg. Indict. 2. We have examined the passage referred to in Brooke, which, though written in the strange dialect of that day, is, if we rightly understand it, more explicit. His words are, which for the sake of authenticity, we extract in the original, *q ou home est indite de fel' p ceux dont part sont indites ou ult' de fel,' et ant acquite p pdn, issint q ils ne sont probi nec legales homenes, ideo*

fuit agard que les inditemts p eux present sera void, et les parties q sont indites ne sera arraignes sur ceo, et nota q cest matter doet estr pledr p cesty q est err sur cest inditemt devant que il plede al felony, et felon arraign sur inditemt ne sera suffer de relinquer general pardon p parliant et de pleder al felon. The meaning of this, we take to be, that "where a man is indicted of felony by those, a part of whom have been indicted or outlawed of felony, and have been acquitted by a general pardon, so that they are not good and lawful men; therefore, it was agreed, that the indictments by them presented, shall be void, and the parties who are indicted shall not be arraigned on them; and note that this matter ought to be pleaded by him who is arraigned on such indictment before he pleads to the felony, and the felon arraigned on the indictment shall not be suffered to relinquish the general pardon, by parliament, and to plead to the felony." And this seems to be the method in which objections to the grand jury, arising under the statute, have always been taken, first by way of plea, and if that is overruled, pleading over to the felony—Wm. Jones 98—or, as it is said in some books, pleading the objection to the indictment, and, at the same time, pleading over to the felony. Hawkin's Indictment, § 26. At common law, whatever were good exceptions to a grand jury must have been taken before the bill found. Bac. Abr. Juries A. And as to those objections which arise out of the several statutes, it is the better opinion that they are not allowable, unless they are taken before trial.—*Ibid.* We are therefore of opinion, that the reasons of all the decisions apply with increased force to the case under consideration; and that whatever weight there might have been in the objections to the grand jury, if taken at a proper stage of the proceeding, upon which, however, it is not necessary that we should give an opinion, it is now too late for them to prevail.

As to the third reason, it does not seem necessary to say more than that sufficient appeared upon the transcript to warrant the trial of the prisoner; the bill was found a true bill by the grand jury, and was pleaded to, and it cannot be

presumed that it was found without evidence. I am directed by the court, to say, that all the reasons in arrest are overruled.

NOTE.—See *State* v *Laman*, 3 Hawks 175. *State* v *Kimbrough*, 2 Dev. Rep. 430. *State* v *Seaborn*, 4 Dev. Rep. 305. *State* v *Roberts*, 2 Dev. & Bat. Rep. 540. *State* v *Davis*, 2 Iredall's Rep. 153.

STATE *vs.* DAVIS—Page 291.

A person may be convicted for stealing a runaway slave, knowing him to be runaway and to whom he belonged.

If an indictment charge the stealing a slave "the property of A. B. deceased," judgment must be arrested, for it should have charged the slave to be the property of A. B's executors or administrators.

The defendant was indicted under the act of 1779, Cap. , "to prevent the stealing of slaves, &c." The indictment charged the negro stolen to be the property of John Murrell, dec. Upon the trial in Northampton Superior Court, the jury found a special verdict, the material statements in which were, that on or about the 15th December, 1814, the negro Luke, the property of John Murrell, was in his possession in the county of Northampton; soon after which the negro ran away from him, and whilst he was so runaway, the defendant knowing the fact, and that the slave was the property of Murrell, feloniously did steal, &c. and afterwards did sell him for his own benefit. The case was referred to the decision of this court, whether, upon the whole matter, judgment could be awarded under the act of Assembly.

Daniel, for the prisoner, cited 1 Hale 506—1 Hawk. C. 33, § 1.

TAYLOR, C. J., delivered the opinion of the court.

The two questions to be decided are, whether the facts found amount to felony in point of law—and if they do,

whether they are set forth in the indictment in a sufficient manner to warrant the Court in pronouncing judgment against the prisoner?

1. The finding of the jury fixes upon the prisoner all the essential circumstances to constitute a felony, and excepts this case from the operation of the principle relied upon in his behalf. It not only comes within the reason of the exception to the general rule, but is one of the very cases put in the books, to illustrate the rule and define its extent. The prisoner knew that the slave was run way, and that he belonged to Murrell, and with this knowledge, took him into his possession, and, in less than a month afterwards, sold him. We lay no stress upon the jury having found that the taking was felonious, for we understand that the law is to be found upon the whole case, and that it is to be decided whether the jury have correctly drawn that inference.

The reason why felony cannot be committed in taking treasure trove, waifs, or estray is, that the owner is unknown; the first, becoming the property of the finder, if no owner appears; no property in the second vesting before seisure, nor in estrays until the expiration of the year from the time of appraisement—and in these, it is always understood, that the owner is unknown to the person who takes them up. The rule applies, also, to finding a purse in the highway, which a person takes and carries away,—it is no felony, although the usual proofs of a felonious intent follow the act. "If one lose his goods and another find them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawful." 3 Inst. 107. But, in all these cases, the person taking the property must really believe it to be lost, for if he do not, and take it with the intent to steal, he will not be excused by the pretext of finding, otherwise every felony would be so excused. This is expressly laid down in Hale and other writers. If a man's horse is grazing at large on his neighbor's ground, and it be taken with a felonious intent, the crime is complete. In short, this principle will be found to pervade all these cases, and ascertains every taking to be a felony, if the intent be

such, provided there was no reasonable cause for believing that the thing was lost.

2. But judgment cannot be pronounced on this indictment, because it lays the negro as the property of John Murrell, dec. The indictment speaks in the imperfect tense, and relates to the 6th January, 1814, confining the stealing to that period. To whom did the property *then* belong, which was thus stolen? The indictment answers, to John Murrell, dec'd. This is the only way in which the charge itself can be understood, without interposing an advent of time present, between the name and "deceased." We learn, indeed, from the special verdict, that Murrell did not die till the March following; but if the indictment be not legal and certain, in itself, it cannot be aided by the finding of the jury. And that it is defective, in this particular, seems almost too plain to require argument or authority. If the owner of goods be really unknown, it may be so stated in the indictment; but if it be proved on the trial, who the owner is, no conviction can ensue, upon such a charge. If the goods which belonged to a deceased person are stolen, they must be laid as the property of the executors or administrators, for on them the law casts the title. Judgment arrested.

NOTE.—See *State* v *Jernagan*, N. C. Term Rep. 4. *State* v *Blythe*, 1 Dev. & Bat. Rep. 199.

ADJUDGED CASES IN THE

SUPREME COURT OF NORTH CAROLINA,

January Term, 1816.

DEN ON DEM. OF CHESSUN AND WIFE *vs.* SMITH AND WIFE

Page 392.

Where a testator devised lands "unto B. B. to him and his heirs of his body, lawfully begotten; and for want of such, to the heirs of M. T. B." and, in other pasts of his will noticed that M. T. B. was then living, but she had no children then, or ever afterwards, *it was held*, that the limitation to the heir of M. T. B. was contingent, dependent upon the estate tail in B. B., and that upon his dying without issue in the life time of M. T. B., the remainder never took effect.

The lessors of the plaintiff are heirs at law of Mary Turnbull Butcher, and claim title to the premises described in the declaration, under the following clause in the last will of James Turnbull.

"*Item.* I devise unto Bell Butcher, all my lands not already given; I mean *Bell's Gift* and *Gard's Island*, and my lands in *Edenton*, and the remainder of my personal estate, to him and his heirs of his body, lawfully begotten; and for want of such, one-half to the heirs of Mary Pantry, and the other half to the heirs of Mary Turnbull Butcher, or the survivors of them to have all."

Bell Butcher died without issue in 1777 or 1778. Mary Turnbull Butcher died in 1800, and before the commencement of this suit. Neither Mary Pantry nor either of her sons, were ever in this country, but have continued to be aliens.

The testator, in other parts of the will, notices that Mary Turnbull Butcher, Mary Pantry, and two sons of the latter, viz. Robert and James, were alive.

TAYLOR, C. J. delivered the opinion of the court.

When the case of *Smith* v *Barnes* was decided in this court, two of my brethren felt themselves restrained, by peculiar circumstances, from taking any part in the deliberation or judgemt. They have both however declared their concurrence in the reasoning and principles applied by a majority of the court to the decision of that case; and we are all of opinion that it goes the whole length of deciding the case now before us.

The principle of that case was, that no present vested estate was devised to the heirs of *Mrs. Stith*, but an interest which was not to vest until the death of the first devise, without having had issue, and, by his having children, to be altogether prevented. That the word "heirs" must receive its technical meaning, except where it can be collected from the will: that the testator intended that the estate o the devise should vest in interest immediately, and that by the word he intended heirs apparent, if the ancestor be then living.

It is true, that in this will the testator takes notice that *Mary T. Butcher* was then alive; but it does not appear that she had children then, or ever afterwards.

The remainder which was limited upon the tenancy in tail to *Bell Butcher*, must be either vested or contingent. It could not be vested, because *Mary Turnball Butcher* had no children; and if issue had been born to her before the death of *Bell Butcher*, it cannot reasonably be argued that they should be excluded by those who stood presumptive heirs at the time of the testator's death. The remainder is not limited to any definite person, but merely to those, who, upon the death of *Mary T. Butcher*, should be her heirs. It is limited, also, upon an estate tail, a particular freehold estate capable of supporting a contingent remainder.

The ulterior termination must therefore be construed a contingent remainder, which could only become vested in the event of *Mary Pantry* and *Mary T. Butcher* dying and leaving heirs, during the continuance of the estate tail. This expired in 1777 or 1778 by the death of *Bell Butcher* without issue. *Mary T. Butcher* survived him upwards of

twenty years ; so that the remainder to her heirs could never vest in them

Judgment for the Defendant.

Note—See *Stith* v *Barnes*, ante 1 Vol. page 484 —and the cases referred to in the note on the first point in that case.

HODGES *vs.* PITMAN—Page 394.

Money won at gaming and paid, canot be recovered back by the loser.

This was an action brought to recover back money which the defendant had won by gaming at cards, and which the plaintiff had paid at the time of playing. The cause was tried before Taylor, C. J. at Cumberland Superior Court, when the jury, under charge of the court, that the law was in favor of the defendant, found a verdict for him. A motion for a new trial, for mis-direction of the court, having been made and over-ruled, the plaintiff appealed to this court.

Henry argued for the plaintiff, and cited 7 Term Rep. 535, 5 Term Rep. 405. Ambler 269. Acts of 1788, c. 5.

M'Millan for defendant, cited 2 Comyn Cont. 120. 8. Term 575.

Cameron, J. delivered the opinion of the court.

There is no example to be found in the books, where money has been paid, by one of two parties to the other on an illegal contract—both being *parteceps criminis in equal degree*, that an action has been maintained to recover it back again ; and it is unquestionably one of the greatest securities against transactions of this description, that the contracting parties can have *no redress* against each other ; and that where they are equally guilty of an infraction of the law, the claims of either may be effectually resisted.

Of a principle so salutary in its operation in restraining crimes and immoralities, we should be reluctant to weaken

the force, by any refinement of construction, or subtlety of reasoning; and without a broad legislative direction to the contrary, we feel not less disposed than the able men who have gone before us, so to expound the law, is to promote the practice of private virtue, and check the growth of this most ruinous vice of gaming.

We do not find in the act of 1788, language sufficiently explicit for this purpose. It is at best *doubtful*, and does not afford a satisfactory ground of decision, to overrule the common law. The words "other personal estate," seem to relate to specific chattels, as they follow the words "transfer of slaves," and it would be difficult, if not impossible, to enumerate all the chattels that might so transferred. Besides, the word *transfer*, is ordinarily applied to the sale or pledge of a chattel; never to the payment of money. A horse is transferred—but money is paid. If the latter had been intended by the Legislature, it would probably have been expressed. If it is now to be understood, the act must be read thus: "the transfer of money to secure or satisfy the payment of money."

Upon the whole, we are furnished with a clear, strong light to direct us in the plain, open road of the common law, and that leads to the advancement of morality, and the suppression of vice. We ought not to be diverted from it, by the faint glimmering in the statute, into the devious track of doubtful and mischievous construction.——Judgment affirmed.

Note—See act of 1788, (1 Rev. Stat. ch. 51) and the cases upon the construction of it. *Mooring* v *Stanton*, 1 Martin's Rep. 52. *Anonymous*, 2 Hay. Rep. 231. *Stowell* v *Guthrie*, Ibid 297. *Turner* v *Peacock*, 2 Dev. Rep. 303. *Hudspeth* v *Wilson*, Ibid 372. *Dunn* v *Halloway*. 1 Dev. Eq. Rep. 322.

BARGE *vs.* WILSON—Page 396.

Where a testator, having a store house and tavern in a town adjoining each other with a curtilage in the rear of both, devised the store house to his wife for life remainder to his son; and by another clause devised to his son in-law and daughter his "large tavern, excepting however the room over the store, which is to belong to the store;" *it was held* that the ground in the rear of both buildings, passed under the devise of the tavern; for the exception of the room over the store indicated a belief in the testator that he would have conveyed that too, under the devise of the tavern, without such exception, and besides a curtilage is necessary to a tavern, but not to a store, in a town.

The plaintiff claims title to the land on which the supposed trespass was committed under the will of his father, Lewis Barge. The clause in question begins: "Item. I devise and bequeath to my beloved wife Christiana Barge, the store adjoining *the tavern* lately occupied by James Baker, together with the store lately occupied by Samuel Goodwin, during the term of her natural life, and after her death to my son John Barge, and his heirs for ever." The defendant claims title to the same under the same will. The clause in question begins, "I devise and bequeath to my son-in-law John Wilson, and my daughter Polly Wilson, during their, or either of their lives, and after their deaths, to the heirs of the body of the said Polly Wilson, my large tavern in Fayetteville, lately occupied by James Baker, excepting however the room over the store, which is to belong to the store." The store-house and tavern adjoin each other. The cellar wall under the store-house is the dividing line between the two buildings. In the rear of the buildings and between them and the creek, there is a small piece of ground, being part of the lot on which they are erected. The plaintiff claiming the ground immediately in the rear of the store, and from the store to the creek, erected a fence, running immediately from the cellar wall under the store house to the creek. The defendant pulled down the fence, which constitutes the trespass for which the action is brought.

Both parties respectively occupy the buildings devised to them.

M'Millan for the plaintiff. *Browne* for the defendant.

TAYLOR, C. J. delivered the opinion:

The question arising from this record, is, whether the plaintiff is owner of the ground on which he erected the fence; for if he is not, no trespass has been committed by the defendant in pulling it down. And we are of opinion, that it was the intent of the testator to give the whole of the tenement to the defendant, except that part which is especially devised away to the plaintiff, or excepted from the devise to the defendant. Without adverting to the necessity of a curtilage to a tavern in a town, rather than to a store and the utter inutility of a tavern without one, the exception made by the testator of the room over the store, seems to mark his own conception of what he was doing. For why, in a devise of the tavern, should he make the exception, unless he believed that such precaution was necessary to prevent the whole from passing? The room over the store is to belong to the store, otherwise, the testator thought it was comprehended in the tenement, which he describes as his large tavern. We therefore think that the true construction of this will is, that all, except the store and the room over it, were devised to the defendant, for whom there must be judgment.

LOWRIE J. dissented.

DEN ON DEM. OF JONES *vs.* RIDLEY--Page 397.

The possession under colour of title which is necessary to give title to the plaintiff and enable him to recover in ejectment, must be continued and uninterrupted for seven years.

Where the law is clearly for the plaintiff, the court will grant a new trial, though several juries have found for the defendant.

Declaration in Ejectment—Appeal.

In this case the plaintiff produced a grant from Earl Granville to Joseph Davenport, for the land in question, bearing date the day of November, A. D. 1756. He then produced a deed from Edmond Taylor and John Potter to Howell Moss, for the same land, bearing date the day of June 1771: thirdly, a deed for the land in dispute from Howell Moss to Vinkler Jones, bearing date the day of November, 1773; and lastly, a deed from Vinkler Jones covering the same land, to the lessor of the plaintiff, bearing date the day of June, A. D. 1798.

Under this title he produced witnesses to prove an actual possession in himself or those (or some of them) under whom he claimed. It appeared that one Searcey, as well as one Wilkins had been possessed of the land in question, but at a period ulterior to the date of the deed from Taylor and Potter to Moss. After this last conveyance, one witness said that Moss placed his father on the land, who lived on it for two years. Immediately after which time, Vinkler Jones took actual possession of it and held it for two years. Two other witnesses said that Vinkler Jones had actual possession of it four or five years. One of the latter two witnesses said, that this last mentioned possession was before the year 1775, because in that year he went to Kentucky, and knew nothing about a possession of it afterwards. It also appears, that some time after the expiration of Jones's possession, a free man of color, by the name of Henry Smith, lived upon the land by the consent of the present plaintiff, two years; and that some time after he moved away, another

free man of color by the name of Hardy Artis lived on the land, also by the consent of the plaintiff in this cause. None of the witnesses spoke positively as to the time that any one person had had actual possession of the land, but only from the best of their recollection. It appeared that an old field on the land had been for many years called Jones's Old Field.

The plaintiff produced no evidence to show the defendant in possession of the land; nor did the defendant object to the plaintiff's recovery for want of such proof; nor did the court in its charge to the jury, say any thing on that head. It did not appear that the defendant had any title to the land in dispute.

The court directed the jury to find for the defendant, unless they believed, from the evidence before recited, that the plaintiff had had a continued and uninterrupted actual possession of the land, for seven years.

The jury found a verdict for the plaintiff. The defendant moved for a new trial, which the court refused.

It appeared that this suit had been instituted in the County court of Granville, and there tried; which resulted in a verdict of the plaintiff. That the defendant appealed to this court, and that a trial had likewise been had, when a verdict was again found for the plaintiff and a new trial granted.

It is now referred to the Supreme Court to decide whether or not a new trial should be granted.

It is further directed by the Judge to be stated, that the defendant's counsel moved the court for a nonsuit, on the ground that a seven years' possession under color of title had not been proved;—and further, that James Hamilton, the real defendant, obtained title to the land in dispute after the commencement of this action.

Taylor, C. J. delivered the opinion of the court:

The repeated adjudications which have occurred in this State, throughout a long period of time, which may be dated, at least, as far back as the independence of the State, require it now to be considered as a fixed rule of property,

that the possession under a colour of title, must be a continued one of seven years, in order to enable a person to recover in an action of ejectment.

It has been very justly supposed, both by those who made the law of 1715, and by those who have administered it, as far back as we have the means of ascertaining, that this was a reasonable period to warn all adverse claimants, that the person in possession set up an exclusive right, and to challenge them to come forward and exhibit whatever claim they might have against such possession.

But a possession for this period can only meet the spirit and design of the law, when it is unbroken and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without cultivation, without occupancy, and without a tenant.

Thus, the occasional exercise of dominion, by broken and unconnected acts of ownership, over property which may be be made permanently productive, is, in no respect, calculated to assert to the world, a claim of right; for such conduct bespeaks, rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner.

In this case, the first possession, after the date of the deed to Moss, is that in his father, which continued for two years. This is followed by Vinkler Jones's possession, which two witnesses say, continued four or five years.

It is to be observed, however, that one of these witnesses is altogether silent as to the preriods when this possession began or ended; and therefore his testimony is not so satisfactory or convincing as that of the other, who gives a reason for his remembrance, and places the possession before the year 1775, because he then went to Kentucky. This possession therefore must have been before the date of Jones's deed, and as early as that of Moss's, from which to June, 1775, would form only a period of five years.

This is believed to be a correct analysis of the testimony; and if so, there are but four or five years continued possess-

sion proved, since the colour of title accrued. The other possession by the persons of colour, is altogether too vague to be taken into the account; for neither the period of iis commencement nor that of its termination is ascertained by proof; it is not sufficiently connected with the other possession nor with the colour of title.

The law arising from the facts which are in proof, does not vest a title in the plaintiff; and if the verdict stands, the plaintiff will have recovered land, of which he is not the owner.

It would introduce much uncertainty into the law, and place land titles upon a very precarious foundation, if the court were to acquiesce in a verdict so novel, because other juries had done the same. In cases of this sort, the law of a case cannot be separated from its justice. They are indeed, convertible terms; for where the law does not give title to a plaintiff, it cannot be just that he should recover the land and turn another out of possession. We are therefore of opinion that there must be a new trial.

Judgment reversed.

Hall, J. gave no opinion; it being an appeal from his decision.

Note.—See, upon the first point, *Strudwick* v *Shaw*, 1 Martin's Rep. 34, S. C. 1 Hay. Rep. 5. and the cases cited in the note. Upon the second point, see *Murphey* v *Guion*, 2 Hay. Rep. 162, and the cases referred to in the note on the second point in that case.

WILLIAMS *vs.* HARPER—Page 401.

Where a cause is called in due course and the plaintiff nonsuited for failing to appear, the court will grant a new trial upon a sufficient affidavit, but it is proper that it should be upon the payment of full costs.

This cause was tried before SEAWELL, J. at Warren Superior Court, where, on its being called in due course on the second day of the term, and the plaintiff failing to appear, he was nonsuited. In the course of the same day, he came into court and moved for a new trial, upon an affidavit which stated in substance, that he had attended the preceding day, and went home at night for the purpose of procuring the attendance of a very material witness, who had been subpœnæd for him; that on Tuesday morning he called upon this witness, whom he found unable to attend, from the effects of a severe illness, and the deponent then hastened to court, where he arrived too late, but as soon as he well could considering the distance of his abode and the delay occasioned by his calling on the witness.

The judge granted a new trial, upon the plaintiff's paying all the costs, from which order, as to the costs, he appealed to this court.

The case was submitted.

TAYLOR, C. J. The court cannot perceive, in the order appealed from, any thing unusual or improper; for it seems to them perfectly reasonable, that the plaintiff should pay the costs of the nonsuit, occasioned solely by his absence when the cause was called. If upon the mere motion of the party, a new trial could be had under such circumstances, a great portion of the time of the court would be consumed in awarding non-suits and reinstating causes; for that sort of punctuality reqired from suitors, and which is so necessary to the regular dispatch of business, cannot well be enforced, unless the neglect of it be attended with some inconvenience and loss. When, therefore, an indulgence is

asked of the court, which involves a loss of the public time, and occasions inconvenience to the adverse party, it should be granted only on the payment of costs.

Judgment affirmed.

SEAWELL, J. gave no opinion.

NOTE.—See *Sheppard* v *Salter*, 1 Martin's Rep. 40. *Reynolds* v *Boyd*, 1 Iredell's Rep. 106.

BLANCHARD'S HEIRS *vs.* M'LAUGHAN'S ADMR'S—Page 402.

A creditor or next of kin cannot, without special circumstances, call upon a debtor to the estate, but a bill will be entertained for either against all persons in possession of the fund, who have not paid for it a valuable consideration, the administrator or executor of the estate being a party to the suit.

The complainants, next of kin and the only children of *Miles Blanchard*,, dec. state in the bill, that their father died seised and possessed of a considerable real and personal estate, leaving a widow, *Sarah*, who was appointed *administratrix*, and afterwards intermarried with *M'Laughan;* that *M'Laughan* had the exclusive management of the whole during the marriage, received monies for the sale of property and its hire, and for the rent of lands, and afterwards died without accounting to the complainantss: That he also received monies for the rent of other lands, the property of the complainants, as their paternal guardian, which lands were not derived from their father *Blanchard:* That after the death of *McLaughan*, administration of his effects was granted to *Jeremiah Devan*, who received into his possession all the estate of *M'Laughan*, in right of his wife, as administratrix of *Blanchard*, and all the estate of the complainants, to which they were entitled by the death of their father and otherwise.

Upon the death of Devan, a supplemental bill was filed, making his executors *William Sutton* and *Margaret Devan*, parties, and charging that they had received assets of Blanchard and M'Laughan, sufficient to satisfy the complainants, and praying a decree against them.

The cause came on to be heard before TAYLOR C. J. at the Spring Term, 1815, of Bertie Superior Court, when a motion was made to dismiss the bill as to the executors of *Devan*, upon the ground that they were only responsible to the administrator *de bonis non* of *M'Laughan*, who is responsible to the complainants.

The motion to dismiss was overruled by the Court, and from that order an appeal was brought to this court.

Browne for the appelants.—*Nash* and *Hogg* for the appellees.

SEAWELL J. delivered the opinion of the court.

We are all of opinion, that the motion to dismiss the bill should be overruled. And although we hold that a creditor or next of kin cannot, without special circumstances, call upon a debtor to the estate; yet we think we are well warranted by authority and justice, to entertain a bill for both, against all persons in possession of the estate or fund, who have not paid for it a valuable consideration: And that in a case where such fund has been received from one, who was both in law and equity a trustee, there can be no possible objection against his accounting.

In this case, upon the death of M'Laughan, who was in possession of the fund as a trustee, that fund passed to his administrator, who could only stand in his shoes, and represent him in the character in which he originally stood; and upon the death of this administrator the fund coming into the hands of *his* administrator, could acquire no different character, but still remained, in equity, the property of complainant; and has passed on in like manner to the defendants, who have moved to dismiss the bill. Now the objection that the property should first come through the medium of the administrators of *Blanchard*, with the view of paying creditors, completely fails; because these administrators, as

well as the administrators of Devan (who may assert Devan's right) are made parties, and who have it in their power to set up such defence as completely as if they were the only defendant's. The case from Ch. Cases 57, *Nicholson* v *Sherman*, was where a legacy was devised, and testator made baron and feme his executors and died: The baron afterwards made the feme, and his son *his* executor, and dies: The legatee exhibited his bill against both the feme and the son, charging that the *estate* of the testator who devised the legacy, had come to the hands of both; and upon demurrer, the same was disallowed, though the want of privity in law was there urged: And to the same principle are the cases in 2 Vern. 75, and 4 Vesey, ju'r. 651.*

NOTE—See *Cannon* v *Jenkins*, 1 Dev. Eq. Rep. 422. *Brotten* v *Bateman*, 2 Dev. Eq. Rep. 115. *Thompson* v *McDonald*, 2 Dev. & Bat. Eq. Rep. 463

CASEY *vs.* FONVILLE—Page 404.

Marriage operates as an absolute gift to the husband of all the personal estate of which the wife is in possession, whether he survive her or not; but to such as rests in action, the husband is only entitled, on condition that he reduces it into possesoion during coverture. Hence a warranty of title, annexed to a slave sold to the wife while sole, the slave being recovered from the husband after the death of the wife, does not survive to the husband because though relating to property, which did vest in the husband, its essential quality as a *chose in action*, remains unaltered.

SEAWELL, J. stated the case and delivered the opinion of a majority of the court, as follows:

The plaintiff's wife while sole, purchased of the defendant a slave; to secure the title of which, defendant gave a bill of sale, with warranty as to title. Upon the marriage, the slave passed into the possession of the husband; and the

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* This being an Appeal from the decision of TAYLOR C. J. he gave no opinion.

wife dies. An action is then brought against the husband, and the slave recovered by one having superior title to defendant; and the plaintiff, in his own right, institutes the present action of covenant, upon the warranty in the bill of sale to the wife;—and the question is, can he maintain it in his *individual* character?

It was a saying of Lord Kenyon, that if *cases* and *principles* were at variance, the latter must be adhered to; and we think so too. The general principles respecting the rights which a husband acquires by marriage, seem to be as clearly laid down as any belonging to the law: and as regards her personal estate, that the marriage itself is an unqualified gift to the husband of all she is in possession of, whether he survive her or not. But as to such as he has not in possession, or as rests in action, as debts, contingent interests, and the like, or money due her on account of intestacy,—the marriage gives them only *qualifiedly*, namely, upon condition he reduces them to possession *during coverture*; or if she dies first, they go to her representatitve; if she survives, they belong to her. Co. Lit. 351. & no. 1. The husband, it is true, is entitled to administration, and as administrator, may recover them. These rules never have been questioned; and all the decisions on this subject, are professedly in accordance with them.

The slave then, in the present case, being in possession of the wife, passed upon the marriage, absolutely to the husband. But the covenant, which was a contingent and uncertain right, or more properly, was in *action*, remained to be asserted or not, according to its nature; and the wife having died before this right in action was reduced to possession, it is impossible, in the opinion of a majority of the court, for the husband, consistently with the rule laid down, to maintain the action. If the marriage had the effect of transferring to the husband a complete legal right to the covenant, as has been contended, the representatives of the husband, if he were dead, could maintain the action; though the wife had survived the husband, and were alive. We can perceive no solid distinction between this, and any other

covenant with the wife, before marriage. Its relation to a piece of property which became legally and absolutely vested in the husband, cannot affect its essential quality as a chose in action, and that the husband can no more maintain the present action than any other person to whom the wife, while sole, might have sold or given the slave,—the covenant being a mere *personal* contract, which abides with the *parties or their representatives.* [*Quere* of this?]

HENDERSON, J. and TAYLOR, C. J. dissented.

DEN ON DEM. OF THE TRUSTEES OF THE UNIVERSITY *vs.* HOLSTEAD.
SAME *vs.* MARCHANT.
SAME *vs.* PARKER--Page 406.

Where a devisee takes the same estate under the will, which he would have done had the ancestor died intestate, he is in by descent, and the devise is void. Hence where a testator devised lands in 1788 to be equally divided between his two daughters, (they being his only children) to them and their heirs forever, they took as tenants in common, as they would so have taken under the act of 1784 (Rev. ch. 204) had he died intestate.

And in such a devise, if the mother survive the daughters, both of whom dying intestate and without issue, she will not be entitled to a life estate under the act of 1784 (Rev. ch. 204, sec. 7 and ch. 225, sec 3) because the derivation from the parent there mentioned, signifies by some act *inter vivos.*

These were ejectments tried at Currituck Superior Court, at Septemper Term, 1812, when the jury found special verdicts in the three cases, which, by consent, were referred to this court.

The material facts found were, that about the 20th of December, 1788, John Cockton died, sesied of the premises described in the declarations, having duly executed his last will, whereby he devised them to his wife Agnes Cockton, during her natural life, then to be equally divided between his two daughters, Mary Tatum and Barbary Conpun, to them and their heirs for ever; by virtue of which devise,

Agnes entered, and on the 23d December, 1795, by deed of bargain and sale, conveyed in fee to Jesse Simmons, who, on the 31st May, 1796, conveyed in fee to the defendant, who has actually been possessed thereof to the present time.

Barbary, one of the daughters, died in the beginning of the year 1792; Mary, the other daughter, died shortly afterwards, neither of them leaving any children, brothers or sisters, or the lawful issue of such; nor any heirs on the part of the father or mother, except the said Agnes, the mother, who survived them, and died on the 12th Deeember, 1805, without leaving any heirs.

Browne, for the defendants, argued that the daughters took as purchasers under the devise. Com. Dig. Assets. B. 1 Leon. 315. Com. Rep. 123; and that by their death without issue, and the failure of heirs on the part of the father, the land became vested in the mother for life, by the 7th & 3d sections of the acts of 1784, c. 22 & 10; that the deed made by Agnes, should be considered as a feoffment which passed a fee, and displaced all remainders and reversions, according to the opinion of JOHNSON J. in *Wells* v *Newbold*, decided in this court. He also cited 1 Bl. Com. 87. Plowd. 203. 1 Co. 93.

TAYLOR, C. J. delivered the opinion of the court.

The first question to be decided in this case, is, whether the daughters took by descent or by purchase; for if they took by descent, the succession to them must be confined to the blood of the ancestor from whom they inherited, and this being extinct, the estate is vested in the University, as an escheat.

The rule of the common law is very distinct and well established, that where a person devises lands to his right heirs, without changing the nature or quality of the estate, although it be charged with incumbrances, the heir shall be in by descent, a title always favored by the policy of the law.

The cases on this subject proceed on the supposition that there is no election in the heir to take by descent or purchase, for the descent is immediately cast on him, and the devise is considered as having no operation at all.

For if the heir might, at his choice, have taken by purchase, the lord would have lost many emoluments of his seigniory and the specialty creditor of the ancestor, the fund which was answerable for their demands, for until the Stat. Will. 3d, the devisee was not liable.

But if on the other hand, the devisor alter the estate, and limit it differently from what it would descend to the heir, he shall take by purchase. Hence the cases cited by the defendant's counsel, prove unequivocally, that if at common law a person had devised to several daughters in fee, who would have been his heirs at law, they would have taken as purchasers; for had they succeeded as heirs it would have been in parcenary, whereas by the devise, they take in joint tenancy, or in common.

It is now proper to look at our act of Assembly regulating descents, and to learn from it how lands are held which descend on several co-heirs; and the words are very explicit: "The estate shall descend to all the sons, to be equally divided amongst them, and for want of sons, to all the daughters, to be equally divided amongst them severally, share and share alike, as tenants in common in severalty, and not as joint tenants."

It is not necessary to cite authorities to prove, that the devise to the daughters in this case, gives them a remainder as tenants in common. The words "equally to be devided," have repeatedly been adjudged to be, in a devise, words of severance.

As, then, the daughters took the same estate under the will, that they would have taken had the ancestor died intestate, it follows, that they were in by descent, and the devise was void.

After an attentive consideration of the acts of Assembly regulating descents, and particularly of the act of 1784. c. 22, sec. 7, we adopt the opinion, that none of the cases provided for, comprehend a descent from the parent, so as to vest a life-estate in the mother.

The parent shall succeed, where the child derives the estate from him; but that must be by some act *inter vivos*,

for the parent must be dead before the child could derive it by descent from him. The parent shall also succeed where the child actually purchases the estate, or otherwise acquires it. The just construction of this clause, we think equally exclusive of the case of a descent, from the parent, for reasons, which having heretofore been elaborately stated, it would be a waste of time to iterate. The opinion of the Court being in favor of the plaintiffs upon these points in the case, it is unnecessary to notice the others.—Judgment for the plaintiffs.

NOTE.—See *Campbell* v *Heron*, Conf. Rep. 291. *McKay* v *Hendon*, 3 Murph. Rep. 209.

JORDAN *vs.* JORDAN'S EX'R.—Page 409.

The jurisdiction of equity over trusts can only be taken away, by shewing the complete execution of the trust: And where one buys a slave for another with the money of the other, but takes a bill of sale to himself, a mere delivery of the slave to the *cestuy que trust* will not be considered an execution of the trust to oust the jurisdiction of a court of equity over the subject.

This was an injunction bill filed in the Court of Equity for Hyde County, where a motion was made to dismiss the bill for want of equity. That question was referred to this court, upon the allegations contained in the bill.

The cause was submitted without argument.

TAYLOR, C. J. delivered the opinion of the court.

The bill charges that the complainant was advised by his brother, the testator of the defendant, to invest $100 in the purchase of a slave, which he consented to do, and accordingly paid that sum to the defendant, who made the purchase for him. That this transaction took place about the year 1783, when the defendant delivered the slave to him, acknowledging his right and admitting that the purchase

was made with his money. That, about the year 1788, the complainant became surety to his brother for one Cosmo de Medici, in the sum of $100, and the principal having left the State, that sum was demanded from him as surety, with a threat from his brother, that if payment were not made, he would keep the title of the negro as security; and the complainant being unable to prove the payment by Medici, did accordingly pay the debt. That afterwards the defendant's testator instituted an action of detinue against the complainant, to recover the negro;—and upon the trial, produced a bill of sale in his own name, dated in 1783, but registered immediately before the commencement of the suit. This claim was met by the complainant by proving his long possession and payment of the purchase money. Upon which the defendant set up a claim of property, on the score of a pretended agreement as to the debt of Medici; on which the complainant was wholly surprised, and, being unprepared to repel that ground of claim, a verdict and judgment were rendered against him.

These are the material grounds of the bill, and they certainly charge a trust in the defendant's testator; the execution of which, it is one peculiar attribute of this Court to enforce. The property being bought with he complainant's money, and for his use, gives him an undoubted claim to the interposition of this Court, although the bill of sale conveys the legal title to the defendant. Over cases of trust the jurisdiction of this court can only be taken away by showing a complete execution. The delivery of the slave to the complainant cannot be considered as an execution of the trust; for the possession was consistent with it. Nor can it be collected from any other circumstances in the case that there was an extinguishment of the trust. They are at best, but evidence of it; and such a fact ought to appear to the Court in as satisfactory a manner as the original creation of the trust. As therefore this cause is sent up on the case made in the bill, we are of opinion that this Court has, *prima facie* jurisdiction, and that the Injunction ought to be continued to the hearing.

PARMENTIER AND WIFE AND OTHERS *vs.* PHILLIPS ET AL.
Page 411.

Where a person enters upon the estate of an infant, and continues the possession, equity will consider such person as a guardian to the infant, and will decree an account against him, and will even carry on such account after the infancy is determined.

This was an original bill in equity, praying for the appointment of commissioners to sell a tract of land, and to distribute the proceeds thereof, according to the will of John Phillips, amongst the complainants, who are minors, and the heirs at law of Henry Phillips, deceased, the devisee in the said will.

The amended bill calls upon the defendants for a discovery and account of the rents and profits; and that they may be decreed to deliver up possession of the land, in order that it may be sold.

The case made by the bill is in substance as follows: John Phillips died in 1784, having made his last will, in which he gave all his estate to his wife during her widowhood, for her support and that of his children, with direction that each of them should have a certain portion of the personalty, as they married or arrived at full age. On the death or marriage of his wife, he directs that the land shall be sold by his executors, and the money arising from it, to be equally divided among his sons, who shall then be living, or the heirs of their bodies, in case either of them shall have died before the said sale, leaving lawful issue.

Sarah, the widow, died in 1806, unmarried, at which time there was no son of the testator living, nor the issue of any, except Patsey, the wife of Parmentier, the complainant, Jordan Phillips, William Phillips, Eaton Phillips and John Phillips, who are all the heirs and representatives of Henry Phillips, one of the sons of John, the testator.

Henry Phillips, in the life-time of his mother Sarah, and

without having a right, conveyed the land to Frederick Phillips, who, together with the other defendants, viz. Hart, Jones and Bell, were in possession when the bill was filed.

All the executors appointed in the will of John Phillips, have died without leaving executors.

To this bill there was a demurrer, on the ground that if the complainants have the right they pretend, they may assert it at law, by the action of ejectment.

Taylor, C. J. delivered the opinion of the court.

The twofold object of this bill is, to effect an execution of the trust in the sale of the land, which has been prevented by the death of all John Phillip's executors, in order that the proceeds may be divided amongst the complainants; and to call the defendants to an account for the rents and profits of the land. And we are of opinion, that for both these purposes, the suit is rightly instituted in this court.—It seems to have been long established as a rule of this court, that when a person enters upon the estate of an infant, and continues the possession, equity will consider such person as a guardian to the infant, and will decree an account against him, and will even carry on such account after the infancy is determined. Even in those cases where the title is purely legal, and the complainant is put to his election to proceed at law or in this court, where the bill is filed for the land and the mesne profits, he may proceed at law for the possession, and in equity on the account; because at law he can recover the mesne profits only from the time of entry laid in the declaration. The authorities which relate to this point are, 1 Atk. 489. 3 Atk. 130. 1 Ch. Rep. 49. 2 P. Wil. 645. Pr. in Ch. 252. 1 Vern. 296.——Demurrer overruled.

DELAMOTHE *vs.* SARAH B. LANIER, EX'X OF C. LANIER.
Page 413.

An executor or administrator may pay debts of an inferior nature, before he has notice of those of a superior nature, if he does so without fraud.
A contingent debt, though secured by specialty, shall be postponed to a simple contract debt.

In this case a *scire facias* had issued against the defendant, to show cause why judgment should not be rendered against her on a bond given by her testator, jointly with Thomas C. Williams, on an appeal obtained by said T. C. Williams from the County Court of Montgomery. A judgment was obtained by the plaintiff against T. C. Williams, at September Term, 1809, after the death of the defendant's testator. No motion was then made for judgment against the securities on the appeal bond. And the *sci. fa.* was made returnable to May Term, 1812, when the defendant pleaded, "Nul tiel record, former judgments, payments made on specialties and simple contract debts before notice, and judgments obtained against defendant on simple contract debts without notice—which has exhausted and attached the assets, no assets ultra, fully administered."

At May Term, 1814, the following judgment was given by the court: "*The judgment of the court is, that there is such a record.*"

Question for the Supreme Court, whether the defendant can give in evidence judgments obtained on simple contracts rendered against her before issuing or notice of this *sci. fa.* and without notice of the bond; and whether this bond is to be considered such a debt of record that judgments on debts of inferior degree, without notice, and payments thereon, amount to a devastavit?

The case was submitted without argument.

TAYLOR, C. J. delivered the judgment of the court.

The duty of an Executor would be attended with infinite

peril, if he could not safely pay simple contract debts before he has notice of a bond; for then a bond creditor might withhold his claim, till all the assets were exhausted in the payment of simple contract debts, and compel the executor to pay *de bonis propriis.*

But the rule is, that an executor may pay debts of an inferior nature, before those of a superior, of which he has no notice; provided such payment is made without fraud. In debt on bond, the defendant, being an executor, pleaded a judgment had against him on a simple contract debt *ultra*, &c. and upon demurrer, the plea was holden good. *Davis* v *Monkhouse.* Fitzg. 76.

But even notice of the bond in this case, could not, it is believed, have bound the assets before judgment, in exclusion of simple contract creditors; because it was not for the payment of a sum certain, but depended upon a contingency, whether the testator's estate would ever become chargeable with it. For until the appellant failed to prosecute the appeal with effect, and neglected to perform the judgment of the appellate court, the bond was not forfeited. It has accordingly been decided, that a contingent security, as a bond to save harmless, shall not stand in the way of a debt by simple contract. 2 Vern. 101. We are therefore of opinion, that the evidence of payment of inferior debts was properly received in this case; and that the verdict for the defendant ought to remain.

Note.—Upon the question of notice to an executor or administrator of a debt of higher dignity, see *Brown* v *Lane*, 2 Hay. Rep. 159. In *Evans* v *Norris*, 1 Hay. Rep. 411, it is said that debts due shall be paid in preference to those not due, as to which see the editor's note to that case. A set off of a simple contract debt is not to be disallowed because there are outstanding debts of a higher dignity. *Austin* v *Holmes*, 1 Iredell's Rep. 399.

MOSS AND WIFE *vs.* VINCENT—Page 414.

A petition filed to set aside the probate of a will, must be accompanied with an affidavit.

This was a petition filed in the County Court of Nash to set aside the probate of the will of Joshua Vincent, on the ground of the will having been made by fraud and circumvention; and that the petitioners were not made parties to the probate, although they would have been entitled to a distributive share of the estate.

To this petition there was a demurrer for want of an affidavit.

TAYLOR, C. J.

Upon the question of practice presented in this case, the court are all of opinion, that an affidavit verifying the facts on which it is sought to set aside the probate of a will, is indispensable. A probate is an act of a court of justice, and a consequent degree of solemnity is attached to it forthwith. Property is held under it, and many important affairs of the estate transacted by the executor, on its authority. The court therefore cannot sustain a petition, founded on a mere suggestion or assertion that it was fraudulently or irregularly obtained.

Petition dismissed.

NOTE—See acc. *Jeffreys* v *Alston*, post 634.

CAMERON *vs.* McFARLAND—Page 415.

An action will not lie on a bond, part of the consideration of which is an agreement not to prosecute for malicious mischief.

Every transaction, the object of which is a violation of public duty, is void; such as bribes for appointing to offices of public trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured; agreements to stifle prosecutions of a public nature: and wherever it is attempted by a contract, to prevent the due course of justice, as if one promise money to another to suppress his testimony in a cause &c. the law gives no remedy.

The question reserved in this case was, whether an agreement not to prosecute for malicious mischief, forming part of the consideration of a bond, will vitiate it, as being against law?

M'Millan for the defendant, referred to Comyn on Contracts, 34.

TAYLOR, C. J. delivered the judgment of the court:

We do not require the authority of an adjudged case, to enable us to pronounce clearly and unequivocally, that this bond is void. The principle of our decision is incorporated in the common law, which does not sanction any obligation founded upon a consideration, which contravenes its general policy. This impresses upon the transaction an inherent defect, which cannot be removed by the most deliberate consent of the parties, or the utmost solemnity of external form.

Were it otherwise, there is no law, however important to the public welfare and happiness, which might not be paralized by the private agreement of individuals; and it would seem extravagantly absurd, that the law might be called upon to enforce a contract, whose essence and vitality are founded upon the violation of law. For all laws might be overthrown, if men could enter into covenants not to obey them; and if courts of justice recognized the validity of such engagements, the law would be accessory to its own destruction.

The conset of parties alone to a contract, does not impart to it obligatory force; it is also necessary that the subject of it be such as they have a rightful power to contract about. He who receives a vicious bond, does by that very act, relinquish all claim to the favor of the law, inasmuch as he does, as far as he can, give another an unjust and unlawful power over him.

This principle is very fully illustrated in *Collins* v *Blantin*, 2 Wils. 347, where the defendat and others being indicted by one Rudge, the plaintiff gave his note to Rudge, to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. Rudge did not prosecute; and the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose, viz. the compounding the prosecution, and the bond given to secure and repay that, that the bond was illegal and void.

In many subsequent cases, the same doctrine has been enforced, and they all establish, that every transaction, the object of which is a violation of a public duty, is void; such as bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured; agreements to stifle prosecutions of a public nature: All these considerations have been respectively brought into judgment, and pronounced illegal. And wherever it is attempted, by a contract, to prevent the due course of justice, the law gives no remedy upon it. As if a man promise money to another, in consideration that he will not give evidence in a cause; such promise cannot be enforced, on account of the illegality and iniquity of suppressing testimony in any cause.

Judgment for the defendant.

Note.—See acc. *Sharp* v *Farmer*, 4 Dev. & Bat. Rep. 122. Marriage brokage bonds are void. *Overman* v *Clemmons*, 2 Dev. & Bat. Rep. 185.

GRIZZA COLLINS *vs.* SHADRACK COLLINS'S EX'RS—Page 417.

Where a widow dissents from her husband's will, she is not entitled to a year's provision under the act of 1796.

The testator died in November, 1814, having made and duly published his last will in writing; whereof he appointed the defendants his executors, who caused the same to be proven at February Term, 1815, of Edgecomb county Court.

The petitioner, his widow, being dissatisfied with the provision made for her by the will, entered her dissent to the same at the same term, and exhibited this petition to the County Court, claiming the benefits of 29th chap. Acts of 1796,—alleging that by her dissent to the provision made for her by the will, her husband died *intestate as to her.*

CAMERON, J. delivered the judgment of the court.*

The widow's claim to the benefit of the act of 1796, ch. 29, depends entirely on the husband's dying intestate generally. Where he leaves a will, and she dissents to the provision made for her by it, such dissent, only produces a *partial* intestacy as to her.

The words of the act are "where a man shall die intestate, leaving a widow," &c. Here the husband did not die intestate. He disposed of all his estate by will duly executed and published; and thereby made provision for his wife. He could not foresee that she would be dissatisfied with that provision and claim the privilege of dissenting from it.

According to the construction of the act contended for in behalf of the petitioner, it is not the omission of the husband to make and publish a will in his life-time, but the act of the widow, which renders him intestate. By her acquiescence in the will, the husband dies testate; her dissent

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TAYLOR, C. J. *dubitante.*

produces intestacy. It depends wholly on her conduct, after the death of the husband, and after his will is admitted to probate, whether he is to be considered as having died *testate* or *intestate*.

This surely is not such a *dying intestate*, as is contemplated by the act under consideration. In support of this opinion, let it be further observed, that the act directs that "where a man shall die intestate, leaving a widow, she may take into her charge and possession so much of the crop, &c. then on hand, as may be necessary, &c. until letters of administration shall be granted," &c. Now the Legislature could never have intended to interfere with the will of the testator, or the rights of the executors, by authorising the widow to take into her possession that property which the law, operating on the will of the testator, authorised them alone to take possession—yet the construction of the act contended for in behalf of the petitioner, would produce that effect.

Sales of the perishable estate of intestates usually take place immediately after administration is granted. The allowance for the widow and family should be set apart before such sale takes place. Hence she is required by the act to exhibit her petition "at the same court when administration is granted." Yet if by entering her dissent to the will, she can entitle herself to a year's allowance out of the crop, &c. she may do it *six months* after the probate of the will; when, in all probability, the executors have sold the perishable estate and disposed of the proceeds according to the will of their testator. Out of *what* will her year's support, in such case, be allotted?

The act of 1784, ch. 22, authorises the widow to enter her dissent within six months after probate of the will, and enacts, "notwithstanding her dissent, if the jury find and return that 'she is as well provided for by the will as by taking that allotted to her by law in case of her dissent,' she shall be therewith content." Suppose a year's provision allotted to the petitioner, according to the construction of the act contended for in her behalf, and that the jury to be em-

pannelled pursuant to the directions of the above recited act, should find that the legacy given to her by the will is equal in value to the distributive share she would take under the act of Assembly with which, in the words of the act, *she shall be content*, it would then appear that the widow of a man, not dying intestate either *generally* or *partially* (as respects his wife) had received the benefit of the act intended for those only whose husbands die *intestate:* and that she had received a portion of her husband's estate, not allotted to her by *his* will, or justified by the act in question.

Such difficulty can only be avoided, by bearing in mind, that the Legislature never intended that the acts of 1784 and 1791 on the same subject, and the act of 1796 (the act in question) on a different subject, should be blended together in their operation and effects.

A majority of the court is of opinion, that the widow of a man dying and leaving a last will, cannot, by her dissent to such will, entitle herself to the benefits of the act of 1796, ch. 29, in addition to those conferred on her by the acts of 1784, ch. 22, and 1791, ch. 22.

Wherefore judgment for defendants.

SEAWELL, J. I cannot yield my assent to the opinion of a majority of the court, in this case.

I think we are disregarding the obvious meaning of the Legislature through a ceremonious respect to the words they have used.

In the exposition of all instruments, the intention of the makers is the only guide. And as regards statutes, it is a very ancient rule, to consider the old law, the mischief, and the remedy. And Lord Coke has ventured to assert, that it is the office of Judges always to make such construction as shall repress the mischief and advance the remedy, according to the true intent of the makers. Heydon's case, Co. Rep. and Sir E. Plowden, who is denominated by Lord Coke, a grave and learned apprentice of the law. In a *nota bene* to the case of *Eyston* v *Studd*, 2 Plow. 465, it is said, "that it is not the words of the law, but the internal sense

of it, that makes the law: that the law consists of two parts, a body and soul; that the letter is the body, the sense and reason the soul,—*qua ratio legis est anima legis;* and that the law may be resembled to a nut, which has a shell and kernel within; the letter representing the shell, the sense the kernel. And as you will be no better for the nut if you make use only of the shell, so you will receive no benefit from the law if you rely only on the letter." And Chief Justice Brook, another venerable sage, in *Hill* v *Grange*, reported by Plowden, in speaking of the construction of statutes, says, "that when an act is made to remedy a mischief, that in order to *aid things in the like degree,* one *action* may be used for another, one *thing* for another, and one *person* for another, notwithstanding that in some respects the thing is penal. As in the action of waste given by stat. Glou. against termers for *years*, by *equity* it is extended to him who holds for a *half year;* so the stat. of Westm. which gives an action against a jailor who lets out one committed for arrears of account, is extended to a case of commitment for *debt.* So the Stat. Wilm. which gives a *cui vita* after coverture dissolved by death, extends to a case of divorce. So one *thing* for another, as an *elegit de mediatatum suæ terræ*, which is given by Stat. yet it extends to a moiety of a *rent.* And in respect to *persons*, the Stat. 4 Ed. 3, gives an action *de bonis asportatis*, to executors, yet it is extended to administrators."

Servilely treading in the footsteps of these great fathers of the law, let us pursue their mode, and first enquire, how the old law stood, what was the mischief, and what the remedy the Legislature has applied? What the law was, and what the mischief intended to be remedied, are recited in the act itself. We are not left at large to conjecture or put in difficulty to collect from the remedy what was the disease; but the Legislature themselves, in an act, the title of which is to make "further provision for the widows of intestates," recites in the preamble, "that it is in the power of administrators to dispose of the whole of the crop and provisions of the deceased, and thereby deprive the widow of the means of sub-

sistence for herself and family." To remedy which mischief they declare, "that whenever any person shall die intestate, the widow may petition and she shall be entitled to a year's support."

By the act of 1784, it is declared, that if any person shall die intestate, or make such provision by will as shall not be satisfactory to the wife, upon signifying her dissent, she shall be endowed of a third part of the lands and a child's part of the personal estate,—placing the widow dissenting, precisely in the same situation as if no will had been made.

In the present case the widow dissented, and on her petition for the year's support, in virtue of the act of 1796, she is told, you are not within the meaning of that act, because your husband made a will and the act only relates to the widows of those who died intestate.

Now it is very clear that the mischief which the Legislature intended to remedy, was the inadequacy of the provision allowed by *law*; and that the petitioner's case is precisely such a one; that is to say, she is a widow who has received only what the *law* has provided for her, petitioning in virtue of the act ot 1796, which act declares that its design is, to make such widows a further provision. If her case then, comes within the mischief intended to be remedied, it would seem, that inasmuch as it was the *mischief* the Legislature was aiming at, that she ought, by an equitable construction, to receive its benefit. The statute *de bonis asportatis*, only enabled the executor to sue; yet, for the sake of reaching the mischief, it was extended, by construction, to an administrator. But let us examine if this difficulty in reconciling this case with the words of the act of 1796 cannot be gotten over. For if it can be shown, that the husband die intestate, the petitioner will then be within both the *design* and *words* of the act—and this, to me, has not half the difficulty, as making an executor mean administrator, a rent issuing out of land mean the land itself, or a dissolution of marriage by death a dissolution by divorce; all of which have been done.

When a wife dissents to the provision made by a husband

in his will, he thereby, as to her, dies intestate, in the same manner as he would do in case of a lapsed legacy not otherwise guarded, or as to real estate in case of a will with one witness; and whether as to the rest of the world, the husband died testate or intestate, is of no importance in the present inquiry. It can only be material, when a petitioner has been already provided for, and then only to prevent, as it were, a double portion; one from the bounty and duty of the husband, the other which the law has provided for those who have no other resource.

If the act is to receive this nice constructiou, what should we do with a case where a husband, possessed of a large estate, made no other will than barely to appoint executors who should refuse to qualify, and the widow should petition for her year's support? I can hardly suppose her petition would be rejected. And how does the present case differ from that in principle? The petitioner has received nothing from the bounty of the husband; he either omitted her entirely in the will or made such provisiou as she chose not to rely on, and has applied to the law. She has no other subsistence for herself or family than that which the law has allowed her, and this she may be kept out of for two years by the executor; —and as to the personal estate, that even may be swept away by creditors; and she is, in the mean time, either to beg or starve. Such a construction, therefore, seems to me at variance both with the lettter and spirit of the act.

If it be asked, what is the situation of a widow who does not dissent, where the debts against the estate are sufficient to swallow up the assets? I answer, she acts with her eyes open. She may rely if she chooses, upon the provision made by the husband; and if she is doubtful of that, she ought to dissent, and rely upon the law. The maintenance allotted her is exempted from the demands of creditors and claimants.

It is to me matter of regret, that any case should arise, in the determination of which, a difference of opinion should prevail; and greatly as I at all times respect the opinions of

my brethren, when in opposition to my own, I cannot from mere respect, without conviction, subscribe to a construction, in my understanding, so much at variance with the true meaning of the act. A majority being of a different opinion, there must, however, be judgment that the petition be dismissed.

NOTE.—Widows who dissent from their husband's wills are now entitled under the act of 1827 (1 Rev. Stat. ch. 121, sec. 22). See *Pettijohn v Beasley*, 1 Dev. & Bat. Rep. 254.

OFFICE *vs.* GRAY—Page 424.

If an indictment be quashed, and the prosecutor be ordered to pay the costs he is not liable to pay for the attendance of witnesses on either side.

The defendant was endorsed as prosecutor on an indictment against Gassett, for malicious mischief, which was quashed by the court, and the prosecutor ordered to pay the costs. An execution accordingly issued against him, comprehending the charges for the witnesses summoned for the State, as well as those summoned for the defendant. To set aside the execution, so far as it related to the witnesses, was the object of this motion, which was referred to this court, from the Superior Court of Randolph.

TAYLOR, C. J. delivered the judgment of the court.

We do not apprehend that any of the acts of Assembly on this subject, will, when fairly construed, warrant the taxation of the costs of witnesses against a prosecutor, under the circumstances of this case.

The first act of 1779, c. 4, authorises the court to order the costs to be paid by the prosecutor, where the State shall fail upon the prosecution of any offence of an inferior nature, in case such proecution shall appear to have been frivolous or malicious.

The uniform exposition of this act, has confined it to a failure by an acquittal of the defendant; because it contemplates that the witnesses must be examined in presence of this court, to the end of enabling them to judge whether the prosecution is frivolous or malicious.

If it extended to other cases of failure, then it would embrace that of a *nolle prosequi*; yet in 1797, it was thought necessary to pass an act to provide for that case, and to authorise the courts to tax the prosecutor with costs, if the prosecution was promoted on frivolous or malicious pretences and grounds. And this, it is believed, can only be made known to the court by testimony.

The only remaining act is that of 1800, c. 17, which provides, that if the defendant be acquitted on any charge of an inferior nature, the court may order the costs to be paid by the prosecutor, if such prosecution shall appear to have been frivolous or malicious.

An indictment may be quashed if the offence be not indictable, or if it is not set forth with legal precision; but if it is free from these imperfections, it is not easy to conceive how it could be quashed for being frivolous or malicious. This could only be done by a law authorising the court to proceed as in the case of a *nolle prosequi*.

We are therefore of opinion, that all the witnesses' tickets should be struck from the taxation of costs.

MUMFORD AND OTHERS *vs.* TERRY—Page 425.

Whenever a person has sustained an injury in his property by the erection of a mill by another, it is necessary, if he wishes to obtain redress, first to file a petition in the county court according to the act of 1809. (1 Rev. Stat. ch. 74, sec. 9, et reg.)

This is an action on the case (for a nuisance) to recover damages done to the plaintiffs, in consequence of the defen-

dant's having erected a mill dam across the same stream on which the plaintiff's mill stands, and below it. The declaration contains three counts. 1st. That the defendant erected a dam on the same stream, below the plaintiff's mill—in consequence whereof, the water was thrown back on the wheel of the plaintiffs' mill, whereby, &c. 2d. That the plaintiffs have a good mill-seat on the same stream, and below their present mill—that the defendant hath erected a dam below said mill and mill seat, in consequence whereof, the water reflows, becomes dead, &c. and the plaintiffs cannot remove their mill to such mill-seat below their present mill, or build a new mill at such seat. 3d. That the foundation of the present mill owned by plaintiffs, has become ruinous, &c. that there is a good mill-seat on the same stream below, belonging to the plaintiffs—that the defendant hath erected a dam below said mill-seat, in consequence whereof, &c. as in the 2d count—whereby, &c.

The defendant pleads to the jurisdiction of the court, the plaintiffs having commenceced this action originally in this court, without having first filed their petition in the county court, in conformity with the act of Assembly passed in 1809, c. 15, and without there having been any proceedings between the parties under said act.

It is submitted to the Supreme Court to decide, whether the plaintiffs, who sue for an injury alleged to be done by the erection of the dam attached to a public mill by the defendant, can maintain such original suit in this court, without having first filed a petition, &c. as required by the aforesaid act af 1809, c. 15. Should the court be of opinion that such suit cannot be originally brought and maintained in this court, without a previous compliance with the requisites of said act, then the plea to be sustained, and this suit to be dismissed. Should the court be of a contrary opinion, then the plea to be overruled, and the defendant to answer over.

The case was argued by *J. Williams* and *Henry* for the plaintiffs, and *Browne* for the defendant.

Taylor, C. J. delivered the opinion of the court.

We have not doubted for a moment as to the design of the

Legislature in passing this act, or the construction which, as well the terms of it as the mischiefs it was evidently intended to remedy, require it to receive.

The object of the act is to modify the common law right, because it was susceptible of abuse, and might sometimes be employed oppressively to the defendant, without affording proportional redress to the plaintiff; and to suspend it in all cases, except those provided for in the 5th section, the words of which are, "in all cases where the jury shall assess the yearly damage as high as the sum of ten pounds, nothing contained in this act shall be so construed as to prevent the person thus injured, their heirs or assigns, from suing, as has heretofore been usual in such cases; and in such cases, the verdict and judgment of the jury on the premises, shall only be binding for the year's damage preceding the filing of the petition."

In every case, therefore, of a person's receiving injury from the erection of a mill, a petition must be filed, in order to ascertain the extent of it, because upon that depends, whether the common law remedy is exerciseable. If the damage assessed be under ten pounds, the action is wholly taken away; if it be over that sum, the action is left to the party. Now when the act declares that nothing in it shall be so construed as to prevent persons in whose favor the jury have assessed the annual damage to the amount of ten pounds, from bringing an action, it is equivalent to express words of exclusion, as to all those in whose favor a less sum is assessed.

The general rule of construing, affirmative statutes is, that they do not take away the common law, but leave the party his election to proceed on either; yet if an affirmative statute introduce a new law, and direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. Plow. 206. The case before us is still stronger, because it contains what are equal to negative words. The demurrer to the plea must therefore be overruled, and the suit dismissed.

Note.—See *Gillet* v *Jones*, 1 Dev. & Bat. Rep. 339.

BERRY *vs.* HAINES--Page 428.

That part of the suspension act of 1812 which authorised bonds to be given to the sheriff having an execution in his hands, and execution to issue, is constitutional.

A law may be valid in some parts, though in others it infringe the constitution, and only such parts of the suspension law as impair the obligation of contracts are void. Therefore a surety, who had executed a bond under the act, was held liable to an execution, without a suit and without notice of a judgment to be moved against him.

This was a motion to set aside an execution issued against Berry, who had executed a bond under the suspension act, as security for M'Glinn for the stay of an execution against him, at the suit of Haines. The bond was given to the sheriff, who had the execution in his hands. The affidavit of Berry states that the act of 1812, "to suspend executions for a limited time," under which the bond was given, had been solemnly declared, by the Supreme Judicial Tribunal of the state, unconstitutional and void, and that execution had issued against Berry without suit having been brought against him, or any notice of a judgment to be moved for against him in his absence, and without an opportunity of being heard or making defence.

No argument was made in the case.

TAYLOR, C. J. delivered the judgment of the court.

The act "to suspend executions for a limited time" was brought under the judgment of this court, in consequence of an application on the part of a debtor, to obtain the benefit of the stay.

The application was rejected on the principle, that the act in allowing such stay, impaired the obligation of contracts, and thereby violated the Constitution of the United States.

It was not intended by the case of *Crittenden* v *Jones*, to anticipate any legal consequences which might appertain to those cases where the suspension had already been effected, further than to declare that it must thenceforth cease to operate, and that execution might promptly issue.

As the *spirit* of that decision was protective of the rights of creditors, so now, when we are called upon to consider its *operation* and *effect*, we are of opinion, that it left them in the unimpaired possession of those added cautions and securities of their claims, which their debtors had voluntarily imparted to them. For the idea must be borne in mind, that on the part of the debtors, there was no compulsion; they spontaneously did whatever was necessary to obtain the benefit of the act. Many did omit, and all might have omitted to ask any indulgence under it. On the part of the creditor, it was all compulsion; for whether he approved or not a compliance with the terms of the act would place the debt beyond the reach of legal process, for a shorter or longer period.

A law may be constitutional and valid in some points, and in others not so; and as the only reason why any part of the suspension act was deemed void, was, because it impaired the obligation of contracts, it follows, that such parts of the act as do not lead to that consequence, must be effectual.

It is only by a discriminative constructions of this sort, that we can avoid the most palpable legal absurdity, blended with the grossest injustice.

It would appear extremely paradoxical to lay down the position in the abstract, that the obligation of contracts may be impaired by a law, which has been declared unconstitutional by the Judiciary, and so declared, because it did impair the obligation of contracts. Yet nothing is more easily demonstrated, than that such consequences may, and probably will ensue, if the executions in these cases are set aside, and the securities discharged.

A sheriff had in his hands an execution against a person who was able to pay the debt, but who before the levy, gave the necessary bond and obtained the stay; he afterwards becomes insolvent, and the bond given by him and his securities is declared void, because taken under an unconstitutional law. In such case, that very law operates to deprive the creditor of his debt. And the case is yet stronger,

where a levy is actually made, for the property must have been restored under the 4th section of the act. In both cases, the extended arm of the law was prepared to do justice to the creditor, when it was palsied by the touch of the Suspension Act; but the return of its animation, is marked by an increase of its vigor, derived from the very causes that impeded its functions. Like ANTÆUS, it has touched the ground but to receive new strength.

With respect to the other reasons stated in the affidavit, that execution hath issued against Berry, without suit or notice, or the opportunity of being heard, it seems only necessary to remark, that the Legislature had an undoubted right to invest these bonds with the force of judgments, because every person who should thereafter sign them, either knew, or might have known, the footing on which they were placed. And although it is a dictate of natural justice, as well as a rule of the common law, that no one should be condemned unheard, or without having an opportunity of being heard, yet it is competent for a person to enter into a contract, by which he waives this right, *quilibet potest, &c.* And this has been done by all those who executed these bonds under the act. We are all, therefore, of opinion, that the *Certiorari* should be dismissed.

NOTE.—See *Jones* v *Crittenden*, 1 Car. Law Repos, 385.

COTTEN *vs.* POWELL—Page 431.

A mortgage of slaves is valid under the act of 1792 (1 Rev Stat. ch. 37, sec. 19 & 21) without an attesting witness between the parties.

A written transfer of slaves is necessary, under the act of 1805 (1 Rev. Stat. ch. 37, sec. 17) in all cases where a person gives slaves to another.

Detinue for a slave. The plaintiff claimed title under a parol gift from *Wall*, whose daughter he had married. The

proof of the gift was, that the slave had been sent to the plaintiff's house by *Wall*.

The defendant claimed title under a mortgage made by *Wall* to him prior to the gift; but the mortgage-deed was unattested. And the case was reserved upon the two questions: 1. Whether a subscribing witness was essential to the mortgage? 2. Whether a written conveyance was necessary from Wall to the plaintiff, under the circumstances above stated.

The case was submitted.

TAYLOR, C. J., delivered the judgment of the court.

The first question arises under the 3d sect. of the act of 1792, c. 6, which requires, that where a written transfer or conveyance of a slave is introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution.

The first section of this act has received a construction in the case of *Bateman* v *Bateman*, wherein it was held that a valid sale might be made between the parties themselves, without delivery; that being necessary only where creditors or third persons were concerned. The reasoning which seemed to the court to justify such a construction, and which it is not necessary here to repeat, goes the full extent of proving, that in this case, a subscribing witness is not necessary to the mortgage-deed, since the contest is between the parties to it, or those claiming under them; and there are no interfering claims of creditors, or third persons, to call for a liberal interpretation of the act.

We are of opinion, on the other question, that a written transfer is necessary in all cases, where a person gives slaves to the man who marries his daughter. The words of the act of 1806, extend to all cases of gifts of slaves, and there is reason to believe, that the policy of the act was especially directed to gifts to a son-in-law; because they were of the most frequent occurrence, and the difficulty of ascertaining the truth in old transactions which depended on the memory of witnesses, only, the litigation, uncertainty, and perju-

ry, which they produced, seemed to call for legislative interposition.

And upon the whole case, we think the law is, that as between Wall and Powell, the mortgage-deed is effectual, without a subscribing witness, and Wall could not claim the negro in the face of it; so the plaintiff, who claims under Wall, and stands in his place, can claim only in *æquali jure*, and cannot set up a right in opposition to the deed.

NOTE—Upon the first point, see note to *Farrell* v *Perry*, 1 Hay. Rep. 2. and *Cutlar* v *Spiller* 2 Hay. Rep. 61 and the note thereto. On the second point, see *Barrow* v *Pender*, 3 Murph. Rep. 483. *Smith* v *Yeates*, 1 Dev. Rep. 302. *Palmer* v *Faucett*, 2 Dev. Rep. 240. *Atkinson* v *Clark*, 3 Dev. Rep. 171. *Downey* v *Smith*, 2 Dev. Eq. Rep. 535. *Bennet* v *Flowers*, 1 Dev. & Bat. Rep. 467. *Hamlin* v *Alston*, Ibid 479. S. C. 2 Dev. & Bat. Rep. 115. *Knight* v *Wall*, Ibid 125.

SHENCK *vs.* HUTCHESON—Page 432

Where the acts of a person may be given in evidence for him his declarations in relation to those acts are also proper evidence. Hence *it was held* that where a person was seen hunting the road with his friends and servants, his declarations that he was hunting for lost notes are evidence of the loss of the notes.

This was an action of trover brought to recover the value of two fifty dollar bank notes, one on the Bank of the United States, the other on the Farmers and Mechanic's Bank of New-York, which the plaintiff alleged he had lost in October, 1812. He proved that he had in possession a fifty dollar note on the Bank of the U. States, which had been cut in two and pasted together, and looked dirty; that the defendant had passed a fifty dollar U. States note to a merchant, and the plaintiff's witness, who had seen the note in possession of the plaintiff, upon seeing it in possession of the merchant, believed it to be the same note which he had seen the plaintiff have; that he had possessed several fifty

dollar notes on one of the banks of the State of New York, not long before the alleged loss; that the defendant had been seen to have a fifty dollar note on a Bank in New York, as well as the one passed to the merchant; that upon the defendant's being asked where he had gotten the notes, he said he had won them from a certain man by the name of Wauhop, who had exhibited wax figures at Lincolnton, in January, 1813. The deposition of Wauhop was taken, who swore that he did not play at cards or gamble with said Hutcheson in any way, or let him have any money. The plaintiff further proved, that the defendant offered two fifty dollar notes to a man who handled a great deal of money, no way connected with him, for safe-keeping. The plaintiff offered no evidence of the loss of the notes but his own declarations in Oct. 1812, and afterwards, and that the defendant had been seen hunting for the notes, as he the defendant said.

The court charged the jury that it was proper for them to receive the declarations of the plaintiff, connected with the other circumstances, to ascertain the loss; and upon this evidence, the jury found a verdict for the plaintiff: and a new trial was moved for on the ground of a misdirection of the court as to the evidence.

Question. Was it proper to receive the declarations of plaintiff, connected with other circumstances, to prove the loss of the notes? If proper, judgment for plaintiff; if not, a new trial to be granted—otherwise not.

SEAWELL, J. delivered the opinion of the court.

The only point submitted to this court is, whether it was proper to admit the declaration of the plaintiff, together with *other circumstances*, to prove the loss of the notes: And we are all of opinion that it was. For we hold, that in all cases where the *acts* of a person can be given in evidence for him, that his declarations in relation to such acts, must necessarily be admitted; as in the case of a claim, demand or tender: For in the first two cases, it is the declaration which *constitutes* the act; and in the latter, they form *part* of it. What these "other circumstances" were, does not ap-

pear in the case; but in answer to the general question stated, it is easy to state a circumstance proper to be connnected with the declaration. Such, for instance, as that the party was seen with his friends and servants diligently searching the road. It not appearing to us, therefore, that these declarations were *improperly* admitted, we can see no reason for disturbing the verdict.——Rule discharged.

Note—See *Jones* v *Young*, 1 Dev. & Bat. Rep. 352. *Askew* v *Reynolds*, Ibid 367. *Davis* v *Campbell*, 1 Iredell's Rep. 482.

[SPEED AND OTHERS *vs.* HARRIS AND OTHERS—Page 434.

Where the defendant appealed from the County to the Superior Court, but by mistake, the plaintiff executed the appeal bond instead of the defendant, the appeal was dismissed for want of a proper bond; but a *certiorari* was directed on the defendant's motion.

The plaintiffs obtained a decree in the County Court of Wake, against the defendants as executors, for distributive shares. The defendants prayed an appeal; which was allowed. The appeal bond sent up to the Superior Court, was executed by the plaintiffs. In the Superior Court, the plaintiffs moved for leave to withdraw the bond filed with the transcript; and that the appeal should be dismissed. At the same time the defendants moved for a writ of *certiorari* in case the court sustained the plaintiff's motion. It was referred to the Supreme Court to say what judgment shall be entered in this case.

Cameron, J. delivered the judgment of the court:

The act of 1777 requires that the party appealing shall give bond, &c. In this case, the party praying the appeal, gave no bond. That given by the plaintiffs (through error no doubt) cannot be noticed for the purpose of giving the Superior Court cognizance of the suit. The appeal must therefore be dismissed for want of such a bond as the act re-

quires from the party praying the appeal. And let a writ of certiorari issue in conformity with the defendant's motion.

NOTE.—See *Hood* v *Orr*, N. C. Term Rep. 151.

MARSHALL *vs.* MARSHALL'S EX'RS—Page 435.

When a replication is filed to an answer, the complainant may have the opinion of the jury upon the facts in issue, and if the complainant does not proceed in the proper time the regular course is to set the cause for hearing absolutely, or with such provisions as the court may direct, but not to dismiss the bill.

To this bill answers were filed, to which a replication was entered. A reference to the master had been made at a former term, and a report made by him was submitted, on the cause being called. The defendants moved to dismiss the bill for want of prosecution; on which question the cause was referred to this court.

SEAWELL, J. delivered the opinion of the court.

When a bill is filed and an answer put in, and the complainant makes no replication to the answer, it is in the discretion of the court to refer it to the master. And this will depend upon the nature of the subject matter, the reference being always for the relief of the court; and not by any means necessary for the determination of any case. For the court may, if it will, take the account itself without any reference.

In this case there was a replication to the answers, by which all charged in the bill, and denied by the answers, was put in issue. The act of Assembly establishing the Court of Equity has provided, that a jury shall form part of the court, and that all matters of fact shall be tried by them. The complainant, therefore, although there was no report, had the right to have the opinion of the jury upon the facts in dispute, who might differ from the master upon the extent

of the testimony then in,—or if there were no depositions, the complainant, according to our practice, might produce pefore the jury *viva voce* testimony. From this it results that the proper course in such case would be, to set down the cause for hearing absolutely, or with such provisions as the court, in its discretion, should deem proper, which must depend upon the conduct of all parties. Wherefore, we are of opinion, that the motion to dismiss be overruled.

NOTE.—See *Holmes* v *Williams*, 4 Hawks 371. The court may now direct the issues of facts to be tried by a jury or decide them themselves, as they think proper. 1 Rev. Stat. ch. 32, sec. 4.

NICHOLS *vs.* PALMER—Page 436.

A bill of sale, like other deeds, takes effect from the delivery. A bill of sale which purported on its face to have been executed on the 10th of November, 1810, but which was attested by the only subscribing witness on the 10th of January, 1811, was held to have been delivered at the last period, there being no proof of any prior delivery.

Detinue for a slave under the following circumstances: The plaintiffs, John Nichols and Jonathan Jacocks, abtained a joint judgment, by confession, against John Drew, the former proprietor of the slave, at Bertie County Court, which begun and was held on the second Monday of November, 1810. The second Monday in the month was the 12th day of the month. An execution issued on the judgment, and was levied on the slave in question, who had been run away for some time before, and was sold by the sheriff the 10th of January following, when the sale was forbid by plaintiff. Jonathan Jacoks became the purchaser, who sold to the defendant. The plaintiff claims under a bill of sale, which *purports on the face*, to have been executed on the 10th of November, 1810.

The subscribing witness deposed, that he was called upon

by plaintiff and John Drew, on the same day of Jacock's purchase, to attest the bill of sale, the said John Drew declaring that he *had* executed it on the day *it purported*, and that witness then signed his name. The bill of sale had no other witness. The subscribing witness stated, that he believed the said Drew was indebted to the plaintiff other than by the judgment, for the purchase of his crops, and that J. Drew, jr. was security to the plaintiff therefor.

Defendant then gave evidence of the declaration of the plaintiff, that he had no interest in the suit, but that it was brought for the benefit of J. Drew, jr. the security.

The jury, under the direction of the court, gave a verdict for the defendant, and, on motion for a new trial, it is referred to the Supreme Court.

CAMERON, J. The only question in this case is, at what time did the bill of sale for the negro in question, from J. Drew to the plaintiff, take effect?

This bill of sale being a *deed*, like all other deeds took effect from its *delivery*. The attestation of the subscribing witness on the 10th of January, 1811, is the only evidence of a delivery. There was no evidence of a delivery on the 10th of November, 1810, the day on which it *purports* to have been made, nor of any delivery between these periods of time. The defendant (or person under whom he claims) had acquired a lien on the slave under the judgment and execution, previous to the consummation of the deed under which the plaintiff claims title.

We are all of opinion, that the charge of the presiding judge was correct, and that the motion for a new trial be overruled.

NOTE.—See *Moore* v *Collins*, 4 Dev. Rep. 384. *Clayton* v *Liverman*, 4 Dev. & Bat. Rep. 238.

DREW'S EX'RS *vs.* DREW—Page 437.

The third section of the act of 1806, (Rev. ch. 701, sec. 3) relating to gifts of slaves theretofore made, refers only to adverse claims. Hence where, after a parol gift made prior to 1806, by a father to his son, the possession of the slaves was sometimes in the father and then in the son, but the title was acknowledged by the father to be in the son, *it was held* that the possession of the father was not adverse, and the third section of the act referred to did not apply.

Detinue for three negroes. Verdict for defendant, and motion for a new trial: Upon which a rule to shew cause was granted, and the case is ordered to be sent to the Supreme Court, to determine whether there shall be a new trial granted, or not, upon the following statement.

The negroes in question were the children of negro Edna, who many years ago belonged to the plaintiff's testator; but the defendant proved a verbal gift of her to himself by the testator about sixteen or seventeen years ago. It was proven by one witness that she continued, however, in the possession of the testator, and was employed by him as his own property until his death, which happened about the month of in the year , and during that time, she had the children now in controversy. Immediately after the testator's death, the executors having taken an inventory of the estate, left the said negroes, with the other property of the deceased, in the care of the defendant, until a sale should take place, which soon afterwards happened, when the defendant refused to deliver up the said negroes and claimed them as his own property, upon which this suit was brought to this court at April Term, 1813. It was proven also in the trial, that on the day of the gift, the son, the donee, carried the slave home with him, and that she was afterwards backward and forward with the father and son, and that it was their practice for the one to assist the other in the crop, by the one who first finished, working with the other. And it was also proven, that all the children were born at the

house of the father, and that he said in allusion to the mother, "that let the possession be where it would, the property was still in the son, and that the mother would have a fine brood for the son, provided the son took care of them." The objection set up to the claim of the defendant, is a provision in the act of 1806, respecting parol gifts. In addition to the foregoing testimony, it was proven by another witness, that at different times, he saw the negroes in possession of old Drew, and never saw them in possession of any other person, and he never heard of any other title but the plaintiff's testator's.

SEAWELL, J. delivered the judgment of the court.

We have no difficulty in deciding this case. Whatever may be the effect of the act of limitations when a plaintiff shall endeavor to support his title by it in an action for personal property, we do not think necessary at this time to be decided, because this case steers clear of such question; and as to the clause in the act of 1806, requiring persons who claim slaves in virtue of parol gifts before that time made, to prosecute their actions within a limited time, that also must be understood to relate to *adverse* claims. and can therefore have no bearing in this case.

Whether the witnesses who deposed to the several facts stated in the case, were worthy of credit, was the peculiar province of the jury to decide. If they were believed, the jury did right; and there is nothing in this case which shews that they ought not to have been believed. Taking the case, therefore, as it appears to *us*, whatever possession the father had, after the gift, was by the permission of the son, and, in fact, according to the joint understanding of both: Such possession, therefore, was the possession of the son, and for which the son could have maintained no action, without shewing that the father claimed adversely. Wherefore, we are all of opinion, that the rule for a new trial should be discharged.

NOTE.—See *Skinner* v *Skinner*, 3 Murph. Rep. 535. *Lynch* v *Ashe*, 1 Hawks 338.

CLINE *vs.* LEMON—Page 439.

Parol evidence cannot be received to contradict the records of the County Court, confirming the report of a jury laying out a road.

This was an action to recover the penalty given by act of Assembly for turning public roads; and on the trial, the plaintiff proved by the records of the County Court, that an order issued in 1799, for a jury to lay off a road from the Fishdam ford on the South fork of the Catawba, to the road leading from Lincolnton to the Island ford: That they returned, "they had laid off a road from the South fork, crossing Clerk's creek at the old bridge place, to the road leading from Lincolnton to the Island ford:" And that an order issued to an overseer to open said road. The plaintiff then proved that the road was shortly after opened and had been worked on by the overseers for about fourteen years as the public road, as at first cut out, until the defendant turned it from that place and continued it turned for six months. The defendant then offered to prove by some of the jurors who laid off the road, that the road cut out by the overseer and continued, differed from their report in this—that it crossed the creek eighty poles above the old bridge place, called for in their report; and that the defendant whilst overseer, turned the road from where it had been cut out, to the old bridge place;—and that the road, as cut out at first, was complained of, by some persons through whose land it passed, as not being the road laid out by the jury. The evidence of the defendant was rejected by the court. The plaintiff further proved, that the road first cut out was equally good and nearer than the road crossing at the old bridge place, as turned by defendant.

It the evidence offered by defendant was improperly rejected by the court, then a new trial to be granted; if properly rejected, judgment for plaintiff.

Cameron, J. delivered the judgment of the court:

No principle of law in relation to evidence, is better settled, than that parol testimony in contradiction of matters of record is inadmissible. The testimony offered by defendant was in contradiction of the records of the County Court of Lincoln, confirming the report of the jury, and the road laid out by them. Such testimony was properly rejected by the presiding judge. Motion for new trial overruled.

Judgment for plaintiff.

HOLDING *vs.* HOLDING--Page 440.

A return upon a subpœna in the name of a person, who subscribes his name with D. S. annexed, (by which is understood deputy sheriff,) is insufficient; for the court cannot judicially know a person deputed to act for the sheriff; because his authority rests upon the private delegation of the sheriff. The return should be in the name of the principal.

The return of a sheriff is upon oath, and therefore concludes a party in many cases; but a return of a person styling himself deputy sheriff, has no greater verity than that of any private individual.

A *sci. fa.* issued upon a judgment *nisi* for a forfeiture, which does not state any sum to have been accrued by the forfeiture is fatally defective.

The defendant was served with a *sci. fa.* to show cause why a fine *nisi* imposed on him for not obeying a *subpœna*, whereby he was summoned a witness for the plaintiff in a suit between him and Smith, should not be made absolute. No sum was stated in the *sci. fa.* Plea: *Nul tiel record*, and *absent by consent of the plaintiff*. The last plea was negatived by the verdict of the jury; and in support of the issue to the court the plaintiff produced a subpœna, on which was endorsed this return,——"*Executed.* Edmond Prince, D. S."

SEAWELL, J. delivered the Judgment of the court:

In determining this case the question necessarily presents itself, whether it appears by the return on the subpœna, that the defendant was summoned? and we are all of opinion

that it does not. The law considers every court cognizant of the officer to whom it authorises such court to direct its precepts: And when return is made, the officer is presumed, in *law*, to have come personally into court and there to have been recognized in virtue of his *commission:* and hence it was unnecessary at common law, to make any return *upon* the writ otherwise than "executed," or the like. The statute of Edward 2, however, required that the return should be made in the proper name of the sheriff. When a precept then is directed to the sheriff of a particular county and is returned, and *appears* to have been executed by a person who was sheriff, the presumption exists that he *was* sheriff, until it shall be alleged otherwise by plea; and if the party affected does any act in aid of this presumption, as by pleading to the action, he becomes forever concluded. 2 L. Ray. 884. 1 Sal. 265.

Again :—Such high confidence does the law repose in the integrity and ability of such officers, that their acts are in most instances, conclusive upon the parties; and this in consideration of the dignity presumed to be attached to the character of him who is appointed to so important an office, and of the oath also, and the sureties of such officer, truly to execute the same. But with respect to a person deputed by the *sheriff* to act for *him*, this court cannot judicially know him, because his *authority* to act rests upon the *private* delegation of the *sheriff;* and a strong authority in this point is *Woodgate* v *Knatchbull*, 2 Term Rep. 148, per Buller Just. and 2 Bla. Rep. 834.

In the present case it is not pretended that Edmond Prince, in whose name the return is made, was the sheriff; and if it was, the fact appears otherwise, by the return itself; for he signs "Edmond Prince, D. S." a character perfectly understood in this State, to mean *deputy* sheriff. The subpœna then is directed to the sheriff of Chatham, commanding him to summon the defendant, and it is *certified* to be executed by an individual, who (to make the most of the case) certifies that he is the deputy of the sheriff.

The return of a sheriff upon a precept is upon oath, and

equal to the affidavit of a respectable citizen, and that is the reason why it concludes a party; but the return in the present case, contains no greater verity than the certificate of John Doe. Prince *may* have been the deputy, and the subpœna *may* have been served; but we cannot recognize a return made in the name of any other person than the officer appointed by law. If such officers are required to make the return in their own name, then there is the security the law intended for the citizen ensured by the return.

If we were to sustain such a return, it is placing it in the power of any individual to make a return upon a precept, provided he will add, 'D. S.' There is, moreover, an incurable objection to the scire facias—no sum being stated to have accrued by the forfeiture; and in a case brought up by a judge for his *own sake*, this court will look into every thing which *incontrovertibly* appears in the proceedings.

Wherefore, we are all of opinion, that the return of the deputy sheeiff cannot be respected, and that there be judgment for defendant.

NOTE.—Upon the question of the return in the name of the deputy sheriff see acc. *McMurphey* v *Campbell*, 1 Hay. Rep. 181. *State* v *Johnston*, Ibid, 293.

ROSSEAU *vs.* THORNBERRY—Page 442.

If the clerk of the county court neglect to take a bond from the party, previously to issuing a *certiorari* as directed by the act of 1810 (1 Rev. Stat. ch. 4, sec. 16) the Superior Court has power to take bond with good security for the prosecution of the suit.

This case came up from the County Court of Wilkes, by *certiorari*, to the last March Term. No bond had been given to the Clerk of the County Court at the time of obtaining the certiorari. At the March term, when the writ and record were returned into this court, a motion was made in behalf of the plaintiff to dismiss the certiorari, for the want of a

bond to prosecute it having been given by the defendant, at whose application it was obtained. Whereupon, the defendant immediately executed and filed in court a bond with sufficient security, for prosecuting his writ of certiorari. And set forth on affidavit, that that was the first period at which he knew that it was his duty to file a bond. The motion to dismiss was held up for consideration until this term.

The question for the Supreme Court is, Whether the bond could be received by the Superior Court?

CAMERON, J. delivered the judgment of the court:

The object of the act of Assembly which requires a bond to be given (according to the directions of the act) by the party obtaining a writ of *certiorari*, is to indemnify the adverse party against the consequences incidental to the removal of the suit.

The Clerk of the County Court to which the writ goes, is directed to take from the applicant, such a bond as the act requires; if he fails in the performance of this duty, the ends of justice can no otherwise be attained than by such bond being taken in this court, before a trial is had between the parties.

In this case, the applicant for the writ is in no fault. The omission of the clerk of the county court, should not drive him from the Superior Court unheard. He has done all that is in his power (and he has done enough) to secure his adversary, in the event of his being ultimately successful in the contest.

Let the bond be received, and the suit retained for trial.

NOTE.---See *Fox* v *Steele*, 1 Car. L. Repos. 379, and the cases referred to in the note.

McGUIRE *vs.* BLAIR—Page 443.

It is not actionable to say of a man, "he, one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana, in a rookery box, and committed to jail, and remained there until next day nine or ten o'clock, and then was turned out and split for the country," when it is not charged in the declaration that the plaintiff was a justice, or that the words were spoken of him in relation to his office.

This was an action on the case for words; in which the plaintiff charged in his declaration, that the defendant had spoken of him these words, to wit. "*He* (meaning the plaintiff) *one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana, in a rookery box, and committed to jail, and remained there until next day nine or ten o'clock, and then was turned out and split for the country.*" After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words stated in the plaintiff's declaration are not actionable.

SEAWELL J. delivered the opinion of the court.

The words stated in the declaration to have been spoken by the defendant, are not in themselves actionable, as they impute no crime which, if true, would subject the plaintiff to infamous punishment. And it is not charged in the declaration that the plaintiff was a justice, or that they were spoken of him in relation to his office.

There must therefore be judgment for the defendant.

BEANER AND WIFE *vs.* PILLEY AND WIFE—Page 444.

Where a judgment in ejectment was entered against a defendant, because he had not given bond for the costs, as required by act of Assembly, and a writ of possession had issued and the plaintiff put into possession, the court, on the application of the defendant at the next term and his affidavit "that he would have given the security for costs, had he known it was necessary, and that he believes he has a good title to the lands in dispute," should upon a rule's being served on the plaintiff, order the judgment to be set aside, a writ of restitution to issue, and the defendant be permitted to plead, on giving bond and security as required by act of Assembly.

The plaintiffs brought an action of ejectment against the defendants to March Term, 1815, of Beaufort County Court. At the same term the defendants employed counsel, who appeared and entered into the common rule, &c. but the defendants did not give bond for costs, as required by act of Assembly, before making defence. For want of such bond, the plaintiff's counsel struck out from the appearance docket the plea entered for them, and entered up judgment by default final against the casual ejector. A writ of possession issued, under which the plaintiffs were put into possession. At June Term, 1815, the defendant on an affidavit, stating "that he would have given security for the costs had he known it was necessary, and that he believes he has a good title to the lands in dispute,"—obtained a rule on the plaintiffs to show cause why the judgment should not be set aside, a writ of restitution awarded, and the defendants be permitted to plead on giving bond as required by act of Assembly. At September Term, 1815, the rule being made absolute, the plaintiff appealed to the Superior Court, from whence the case is transferred to this court.

Cameron, J. By the application of a positive statute, the defendants have been turned out of possession of the land in question, without having the judgment of a court of justice on the merits of their title. Such a course is at all times to be avoided, when practicable, consistently with the

laws of the land and the powers of the courts. When the suit of a plaintiff in ejectment is dismissed by the appication of the same statute, the costs which he incurs is all the evil he is subjected to. He may recommence his suit and be heard on as advantageous grounds as if his *first* suit had progressed to hearing on the merits. The defendant in ejectment, who is *turned out of possession* without a trial, if compelled to become plaintiff to assert his title, loses many advantages which he possessed as defendant in possessession.

New trials instituted and established as a *mean* of attaining the ends of justice, were not formerly countenanced in the action of ejectment, because the injured party might bring a new ejectment. But as the courts became more liberal, they granted new trials in ejectment where the party applying would suffer by a change of possession; as where the plaintiff has obtained a verdict, it makes a great difference to the defendant whether he has a new trial or is forced to become plaintiff in a new ejectment.

"We should therefore," said Lord Mansfield in the case of *Clymer* v *Litler*, 1 Bla. Rep. 348, "rather lean to new trials on behalf of defendants, in case of ejectments, especially on the footing of surprise." *Runnington on Ejectment*, 398.

We are all of opinion, that the application of the defendant rests on higher grounds than if the cause had been tried, a verdict found for the plaintiffs, and a motion made for a new trial on the part of the defendant. *Audi alteram partem*, is a maxim in the law, founded in justice and highly to be respected. The order of the County Court, making the defendant's rule on the plaintiff was correct.

Judgment affirmed.

Note.—See *Goodright* v *Shine*, 1 Martin's Rep. 54. *Bledsoe* v *Wilson* 2 Dev. Rep. 314.

STATE *vs.* LANDRETH—Page 446.

Malicious mischief is confined to those cases, where the act is done in a spirit of wanton malignity, without provocation or excuse, and under circumstances, which bespeak a mind prompt and disposed to the commission of mischief; and does not include cases where the act is prompted by the sudden resentment of an injury, which is calculated in no slight degree to awaken passion. Hence an indictment for this offence will not lie where the defendant took a mare from his corn-fied, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound with the view of preventing a repetition of the injury.

The defendant was indicted for malicious mischief, in stabbing with a butcher's knife, a mare the property of *Young*; but from from the circumstances disclosed in the evidence, HENDERSON, J. before whom the cause was tried, was inclined to doubt whether the facts proved constituted the crime. He therefore recommended the jury to find a special verdict; in which it is stated, that the defendant took the mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound, with a view of preventing a repetition of the injury.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the court.

We do not think that the facts found in this case, bring the offence within the common law notion of malicious mischief. That seems to be confined to those cases, where the act is done in a spirit of wanton malignity, without provocation or execuse, and under circumstances which bespeak a mind prompt and disposed to the commission of mischief. It is essential, says Blacketone, to the commission of this offence, that it must be done out of a spirit of wanton cruelty, or black and diabolical revenge. 4 Bl. 244.

The conduct of the defendant was certainly highly reprehensible and barbarous, yet it was prompted by the sudden resentment of an injury, which is calculated, in no slight degree, to awaken passion; and there is a difference which

every one must feel, between an act committed under such circumstances, and one where the party goes off his own land in pursuit of an animal which had done him no injury, for the sake of exercising cruelty, or perpetrating wanton mischief Judgment for the defendant.

Note.—See *State* v *Simpson*, 2 Hawks. 460. *State* v *Robinson*, 3 Dev. & Bat. Rep. 130.

BRITTON, GUARDIAN OF M. A. WHITE ET AL. *vs.* BROWNE.
Page 447.

An executor or administrator cannot purchase at his own sale; and must account for any negroes bid off by him at his sale of his intestate's property, to the creditors, if any, if none, to the legatees or next of kin.

The bill states that the complainants are the children of John D. White, who died intestate. That administration on his estate was granted to the defendant and Jonathan Jacoks now dead. That the administrator sold all the personal estate of their intestate, and, among other things the negroes, which form the subject of this suit. That before the sale of the negroes, it was agreed on by the administrators, that they would purchase the negroes for the complainants and pay for them out of their commissions. That at the sale, the defendant declared he was purchasing in the negroes for the children of his intestate; by reason of which decaration they were purchased at £140 0 6, when at that time they were worth £1000.

The bill further states that the other administrator, Jacocks, in his liefetime, did charge himself with *one-half* of the price bid for the negroes; and conveyed by bill of sale to the complainants, all his right to them acquired or supposed to have been acquired, under the purchase aforesaid. That the defendant Browne, possessed himself of the ne-

groes, and has remained in possession of them ever since, enjoying the labor of them. That the guardian of the complainants has tendered to him £70 0 3, being the other half of the price of the negroes, and demanded possession of the slaves and an account of the profits, &c. That the defendant has refused to receive the money and deliver up the negroes to the guardian of the complainants, &c.

The bill prays that the defendant may be decreed to convey to the complainants all his right or title to the negroes, to deliver possession of them to their guardian, and to account for the hire and profits.

The defendant by his answer admits that the negroes were sold, but alleges that a certain Exam Lawrence, who the defendant had previously requested to attend and buy the negroes for the defendant, became the purchaser for and on behalf of the defendant. That he mentioned to Jacocks, and perhaps to some others, his intention of buying the negroes and giving them to the complainants at some future day (negro boy Henry excepted) if he could settle the estate without loss or injury to himself.

He denies such agreement betweed Jacocks and himself as stated by the complainants. That he never intended to let them have the negro Henry; and as to the rest, they were to have them or not as defendant thought proper. That he purchased the negroes without any solicitation from the complainants; and that his declarations in their favor were voluntary without consideration. That he always meant to reserve the power of disposing of the negroes as his discretion might direct him. He further states, that he has paid $300 more than assets have come to his hands. That he is probably liable for $42 05 more, being the amount allowed the widow for one year's support—there being no crop, &c. —which allowance he is advised was not warranted by law. That, as well as he recollects, he made no declaration at the sale of the said negroes, that he was purchasing them for the complainants. He denies that any part of the purchase money was paid by or charged to Jacocks; alleges that the whole was charged to and paid by himself: admits the possession of the

negroes, the tender of £70 0 3 by the guardian of complainants, but denies that he is bound to deliver up the negroes, on the tender of any sum of money.

This cause was referred to the Supreme Court, on the case arising out of the bill and answer, as a case agreed.

CAMERON, J. delivered the judgment of the court.

An administrator, by accepting the apointment conferred by the law, becomes a trustee for creditors and the next of kin of the intestate. Among the latter, he is bound to distribute the personal estate, after satisfying the claims of the former, out of it.

Entrusted by law with the management of the intestate's effects, and credited by it as *agent* for paying debts and distributing the surplus, he is forbidden by principles of just and obvious policy to *sell to, and purchase from himself.* If the law were otherwise, who would (in such case) fix the price of the article sold between the seller and the buyer, when both characters united in the same person, and he interested on *one* side only.

The negroes in question are acknowledged by the defendant, as well as stated by the complainants, to have been the property of John D. White the intestate. They constitute a part of the fund out of which his creditors, (if any there be) ought to be satisfied; the defendant could not by a purchase for himself at his own sale, avoid the payment of his intestestate's debts, but would be liable to creditors to the full *bona fide* value of the property so sold. Nor can he by such purchase, real or pretended (it matters not which) protect himself against the claims of the complainants, but must account in like manner to them, as to creditors.

The decision of this court must therefore be the same, whether the defendant purchased the negroes in question, upon an express declaration that he was buying them for complainants, as they allege, or for himself by his agent, as he contends.

In either point of view, we hold that he is bound to account for the negroes and to deliver the possession of them to the complainants.

Motion to dismiss the bill overruled, and the cause retained for further proceedings.

NOTE.---See acc· *Boatwell* v *Reynell*, 2 Hay. Rep. 1. *Corbin* v *Waller*, Ibid, 108. *Tomlinson* v *Detestatius*, 1bid, 284. *Ryden* v *Jones*, 1 Hawks, 497. *Gordon* v *Finley*, 3 Hawks, 239. *Falls* v *Torrence*, 4 Hawks, 412. *Cannon* v *Jenkins*, 1 Dev. Eq. Rep. 422. *Villines* v *Norfleet*, 2 Dev. Eq. Rep. 167.

JONES *vs.* THOMAS AND LUKE ROSS—Page 450.

In an action of assumpsit against two since the act of 1789 (1 Rev. Stat. ch 31, sec· 89 & 90), where the jury find that one did assume and the other did not, judgment may be entered in favor of the plaintiff against the one who is found to have assumed.

This was a writ of error to reverse a judgment of the county court of Martin. The error assigned was, that judgment had been entered up against one defendant, in a joint action of assumpsit against two; that the jury found that one did assume, and the other did not.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the court:

The rule of the common law is free from doubt, that where, in cases of contract, an action is brought against several, which cannot be supported against all, the plaintiff cannot have judgment; because the contract proved differs from that declared on—a joint contract is declared on, a several one is proved. But this rule is altered by the act of 1789, c. 57, sec. 5, which provides, "that in all cases of joint obligations or assumptions of copartners or others, suits may be brought and prosecuted on the same, in the same manner as if such obligations or assumptions were joint and several." Now the plaintiff sued both, and so far treated it as a joint promise, yet the verdict of the jury has made a severance; and as no time is limited within which the plaintiff is bound

to make his election, there does not seem to be any good reason why it may not be made as well after the verdict as before: In the same manner as where a joint action is brought against two upon a tort, in its nature joint and several, and upon not guilty being pleaded, a verdict is given against one and in favor of the other, the plaintiff shall have judgment against him who is found guilty.

The judgment must be affirmed.

SACARUSA & LONGBOARD *vs.* WILLIAM KING'S HEIRS. &c. Page 451.

The grant made by the Governor in 1717 to the Tuscarora tribe of Indians, is absolute and unconditional, and does not require the residence of the Indians upon the land.

The *proviso* in the act of 1748 ch. 3, sec. 3, being in derogation of rights actually vested in the plaintiffs, cannot be regarded. But if the act of 1748 could rightfully superadd the condition contained in the *proviso*, subsequent legislatures had an equal right to modify or abrogate it. And the acts of 1778 ch. 16 and of 1802 make a different appropriation of the land, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748.

He, who accepts a lease from another, and those claiming under him, are estopped during the continuance of the lease, to deny the title of the lessor.

On the 5th of June, 1717, Governor Eden, by and with the advice of the Lords Proprietors' deputies, made a grant of a tract of land, lying on the south side of Morrahock (now Roanoke) River, to King Blount, for himself and the Tuscarora tribe of Indians.

On the 13th Dec. 1775, Whitmill Tuff Dick, King of the said tribe of Indians, for himself and his nation, made a lease in writing under seal, of a part of the aforesaid tract, to Wm. King, for 99 years—the lease contains a covenant on the part of said Wm. King, his heirs, &c. to pay to the lessors, their heirs and successors, the yearly sum of during the continuance of the lease.

King took possession of the land described in the lease, immediately after its execution—and he, and those who claim under him, have had the undisturbed possession of said, land, from that time continually up to the bringing of this suit.

In April, 1726, obtained a grant from the Lords Proprietors' deputies for the same land mentioned in the lease from the Tuscaroras to Wm. King—and on the 21st of October, 1777, the said Wm. King obtained a conveyance in fee-simple for the same land, derived from the grant of 1726.

Some of the Indians of the aforesaid tribe remained in actual possession of part of the land comprehended in the grant of 5th June, 1717, until June, 1803, when they finally removed from the said land to the state of New-York, leaving one of their tribe in the county of Martin (not on the lands granted to them) to attend to their concerns, receive their rents, &c.

After their removal from the lands so granted on the 5th of June, 1717, in June, 1803 the defendants refused to pay the rent reserved by the lease. This action was brought on the covenant contained in the lease, to recover the rents in arrear. The defendants opposed the plaintiff's claim for the rents, on the following grounds: 1. That by the act of 1748, c. 3, § 3, it is enacted, "that it shall and may be lawful for any person or persons, that have formerly obtained any grant or grants, under the late Lords Proprietors, for any tracts or parcels of land within the aforesaid boundaries (meaning the boundaries of the land described in the grant to the Indians of the 5th June, 1717) upon the said Indians deserting or leaving said lands, to enter, occupy and enjoy the same, according to the tenor of their several grants, any thing herein to the contrary notwithstanding." 2. That the Indians having removed themselves from the said land, the defendants claim the possession of that which they occupy, under the title derived from the grant of April, 1726, and not under the lease made to their ancestor by the Indians in Dec. 1775.

The jury, under the charge of the court, found for the plaintiffs, the amount due for the arrears of rent. A motion for a new trial was made for misdirection of the court which being overruled, the defendants appealed to this court.

CAMERON, J. delivered the judgment of the court:

If the title of the Tuscarora tribe of Indians to the lands leased by them to the defendant's ancestor, depended solely on the confirmation it received by the 2 § of c. 3, acts 1748, to which the 3 § (relied on by the defendants) is added, by way of proviso, the grant and the condition annexed to it, would now be regarded as forming one *entire* contract between the sovereignty of this State and the tribe of Indians. Their title, however, rests on higher grounds. The Governor and the deputies of the Lords Proprietors, having full and competent powers for that purpose, did, by the grant of the 5th June, 1717, vest the lands thereby granted, in the Tuscarora tribe, absolutely and unconditionally. The grant recites, that it is made "in consideration of *great services* rendered by the said tribe of Indians to the Government, and of their agreeing to relinquish all claim to other lands, which had been before allotted to them." It contains no condition by which the Indians are bound to reside actually and perpetually on it. It is a conveyance (in substance) in fee-simple, by those having power to convey, to persons capable of taking and holding lands in fee.

The acts of the General Assembly confirming their title, providing for their comfortable enjoyment of it, by prohibiting white persons from hunting and tresspassing on their lands, were such as policy and justice dictated, and are entitled to approbation and support; but the proviso in § 3 c. 3, 1748, under which the defendants claim, being in derogation of rights actually vested in the plaintiffs by the highest authority, cannot be regarded, or allowed to have any weight in deciding this case.

If, however, the Assembly of 1748, had power to annex the condition contained in the proviso referred to, they had equally a right afterwards, to modify, alter, or abrogate that

condition. It cannot be contended, that the aforesaid 3 § 3 c. 1748, is irrepealable, and that all which has been done by subsequent assemblies for the modification of it, is void, because repugnant to that proviso.

Pursuing the acts of Assembly on this subject, we find that by c. 16 of acts 1778, certain leases made by the Indians were rendered valid—that the lands leased to Jones, and to *other* persons, shall revert to, and become the property of the State, at the expiration of the leases, if the nation be extinct; and the lands now belonging to, and possessed by the Tuscaroras, shall revert to, and become the property of the State, whenever the said nation shall become extinct, or shall entirely abandon, or remove themselves off the said lands, and every part thereof."

The lease made by the Indians to Wm. King, is within the operation of this act; and if any effect is to be allowed to legislative will on this subject, a very different appropriation is made of the land granted to the Indians, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748; under which the defendants claim.

We further find, that by the act of 1802, c. , the Indians were authorised to lease out their unleased lands, to extend other leases. Commissioners were appointed under its authority to superintend and direct the management of their concerns; and they finally agreed by treaty with this State (with the approbation and consent of the General Government) at the expiration of the leases, to abandon all claims to the lands, to the State. It is expressly declared and provided by said act, "that the possession of the lessees shall be considered the possession of the Indians."

At the time the act of 1802 passed and took effect, the plaintiff's, either by themselves or their lessees, were in possession of all the land comprehended in the grant of the 5th of June, 1717. The General Assembly were apprized that the Indians intended to remove from it; they had agreed to renounce all claim to the land on the expiration of the leases made, and to be made under the said act, for the purpose of

securing to them the full benefit of the leases; to allay their apprehensions that their removal from the land might destroy their claims to the rents secured by their leases; in short, to obviate the *very objection* made by the defendants against the plaintiff's demand, under color of the proviso in the 3d sect. 3d c. 1748, the General Assembly, with a proper regard to liberality and justice, enacted and declared that the possession of the lessees should be considered the possession of the plaintiffs;—In effect saying that the removal of the Indians from the land should not prejudice their claim to the rents due and to grow due on leases made and to be made by them.

Viewing this case with reference merely to the acts of Assembly passed on this subject, and admitting that the plaintiff's claim must be governed by those; it is very clear to us that they are entitled to recover.

There is however, another ground, on which the plaintiffs are entitled to prevail. Admitting (for the sake of argument) that the fee-simple of the land comprehended in the lease, vested by the grant of 1726, the mesne conveyances under it, coupled with the actual removal of the Indians, in Wm. King, the ancestor of the defendants (on which point we give no opinion): yet, as he accepted the lease on which this action is brought, and took possessson of the land under it, he could not, and those claiming under him cannot, during the continuance of the lease, say that the plaintiff's have no right to recover the rents reserved and secured by it. Lord Coke says, "if a man take a lease of his *own land*, by deed indented, reserving rent, the lessee is concluded." Co. Lit. § 58. 47 B.—The court is unanimously of opinion, that the motion for a new trial be overruled, and that there be judgment for plaintiff.

NOTE—On the last point see *Dunwooddie* v *Carrington*, post 469. *Smart* v *Smith*, 2 Dev. Rep. 258. *Yarborough* v *Harris*, 3 Dev. Rep. 40. *Mobley* v *Runnells*. 3 Dev. Rep. 303. *Hartzag* v *Hubbard*, 2 Dev. & Bat. Rep. 241. *Lunsford* v *Alexander*, 4 Dev. & Bat. Rep. 40. *Belfour* v *Davis*, Ibid 300. *Montgomery* v *Wynns*, Ibid 527. *Love* v *Edmonston*, 1 Iredell's Rep. 152.

RICHARDSON *vs.* FLEMING'S AD'MR—Page 455.

The act of 1785 (1 Rev. Stat. ch. 37 sec. 29) which requires the registration of marriage contracts, makes them void against creditors only, if it be omitted.

When an administrator confesses judgment on a penal bond, the condition of which is that the intestate shall execute a marriage settlement within six months after his marriage, the assets are protected by the amount of the judgment, although such bond was not registered.

This was an action on a promisory note brought in New Hanover Superior Court, where a verdict was entered up for the plaintiffs subject to the opinion of this court, on the following case agreed. The defendant pleaded, "*fully administered, former Judgment*, and *no assets ultra*," at August Sessions, 1811, of New-Hanover County Court, being the sessions at which the writ was returnable. The judgments pleaded are, one entered on the appearance docket of othe same sessions, and confessed in favor of G. Hooper, the, ther entered on the reference docket of the same sessions, and confessed in favor of A. M. Hooper, according to specialty filed. To the latter judgment a special replication is filed, that it was confessd *per fraudem*, and on an instrument of writing which was void for want of registration. This specialty was a bond in the penalty of £5000, conditioned to be void upon Fleming executing a marriage settlement, within six months after his marriage with Mary Schaw, whereby her estate shall be secured to her and the issue of such marriage.

The question arising from the case is, whether the judgment confessed to A. M. Hooper protected the assets to that amount?

Nash, for the plaintiff, cited Bac. Abr. 77, 2 Saunders 50. Toller 338. 1 Term 690. Touchstone 479. Act of 1785, c. 12.

Browne, for the defendant, cited Yelverton 196.

Taylor, C. J. delivered the opinion of the court.

We do not pretend to touch the question as to the validi-

ty of this marriage settlement or contract against creditors, because it is not presented by the case or pleadings.

The only inquiry is, whether Fleming himself would have been bound by it without registration, if suit had been brought against him; and it is very clear that he would upon the express words of the act of 1785, c. 12, which makes such contracts void only against creditors.

Now the liability of the intestate devolved upon his administrator; and unless we could perceive some way in which he could have pleaded so as to have prevented a recovery, we must pronounce that he had a right to confess judgment, and that the assets are protected to the amount of it. The Clerk of New Hanover Superior Court must therefore enter up judgment, according to the agreement of the parties, that the defendant has fully administered.

NOTE. —Upon the first point see *Saunders* v *Ferrill*, 1 Iredell's Rep. 97. Upon the second point see *Delamothe* v *Laineir* ante 413.

RICHARD B. JONES & WIFE *vs.* BLACKLEDGE—Page 457.

Where on a note payable to three persons the suit was brought in the name of the survivor, the court permitted the attorney in fact of the plaintiff of record to dismiss the suit, though it was alleged and offered to be proved that the beneficial interest was really in another person.

This suit is brought on a note of the defendant payable to Geo. M. Leach, M. J. Spaight, and Francis Leach (now the wife of R. B. Jones) of whom the said Francis is survivor.

Hugh Jones, attorney in fact for R. B. Jones and wife, moves for leave to dismiss the suit. This motion is resisted on behalf of the executors of Wood, to whose use, the endorsement of the writ states, that the suit is instituted; and who it is alleged, are beneficially interested in the note upon which the suit is brought, and claim a right to collect the

money sued for, derived from the facts disclosed in the accompanying affidavits.

The question referred to this Court is, whether Hugh Jones, the attorney in fact of R. B. Jones and wife, has a right to dismiss the suit?

Taylor, C. J. delivered the opinion of the court:

It must be acknowledged that adjudications have taken place in England as well as in this State, wherein courts of law have recognized and protected the rights of the parties beneficially interested in the suit, when the nominal party has attempted to defeat them. Of these cases which have occurred in this State, it is believed that none have been decided under such circumstances as to confer on them the weight of conclusive authorities; for if they had, we should not feel ourselves justified in unsettling the law. And as to the decisions in England, they are in conflict with one which contains such forcible reasoning in favor of the opposite doctrine, as to convince us that it is founded on true principles of law, from which other cases have departed, under the influence, no doubt, of a desire in Judges to administer the real justice of every case, without reflecting on the inconvenience and mischief likely to ensue from confounding the boundaries of law and equity. As the question now occurs for the first time in this Court, we think it right to restore the law of it to its ancient foundations, and to ground ourselves in doing so on the case of *Bauerman* v *Radenius* in 7 Term, 633.

In that case Lord Kenyon observes, "our courts of law consider only legal rights: our courts of equity have other rules by which they sometimes supersede those legal rules; and in so doing they act most beneficially for the subject. We all know, that if courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt, or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record and considered third

persons as parties in the cause. It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate, but, by my industry I can discover what our predecessors have done, and I will servilely tread in their footsteps."

The court are in this case all of opinion, that Hugh Jones, who claims to be attorney in fact of R. B. Jones and wife, ought, upon verifying his power of attorney, to be allowed to dismiss the suit.

NOTE.—See *Arrington* v *Horne*, post 631.

PERRY *vs.* FLEMING.—Page 458.

The interest to disqualify a witness must exist at the time of trial, and, if before that, the witness removes the interest by releasing it, or does all he can to remove it, as by filing a release in the clerk's office when the party is not present to accept it, his competency is restored.

Fraud in obtaining a bond will vitiate it, and evidence tending to show is admissible under the general issue.

Debt on bond to which *non est factum* was pleaded. The subscribing witness to the bond, had soon after its execution purchased the right, but without endorsement; but in order to restore his competency as a witness, signed and sealed a release of all his right to Perry, the plaintiff, who, not being at court, the release was deposited in the clerk's office for his use; and the witness was allowed to prove the execution of the bond. The defendant offered evidence of fraud in procuring the bond, practised on him by the plaintiff and the witness, which the Judge who tried the cause would not receive; on which a verdict was entered up for the plaintiff. On a motion for a new trial, the case was referred to this court, on the points above stated.

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the court:

We understand the principle of evidence to be well estab-

lished, that the interest to disqualify a witness must exist at the time of trial; so that, if before then, the witness either removes the interest, or does all that can reasonably be expected from him to remove it, his competency is restored. The interest of the witness may arise from his being answerable to one of the parties, or that party to him, in the event of the cause being unsuccessful. A release from the party in the first case or a refusal by the witness, and a release from the witness in the latter case or a refusal by the party, alike restores the competency. This doctrine was recognized in the case of *Fowler* v *Welford*, Douglas 139, where it is very sensibly observed by Mr. Justice Ashurst, "that every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption is taken away by proof of his having done all in his power to get rid of his interest.

As the plaintiff was not present when the cause was about to be tried, and it was necessary for the witness to divest himself of the interest, there is no way in which he could more formally and effectually do it than by depositing the release in the clerk's office for the use of the plaintiff: and such conduct does, in our opinion, bring this case within the reason and spirit of the rule, and renders the witness competent.

But on the other point in this cause, we are of opinion, that the evidence offered by the defendant of fraud in obtaining the bond, was improperly excluded. Such evidence, if true, goes in support of the plea of *non est factum*, and tends to show that the bond never had a legal existence. *Lester* v *Zachary*, Jan. Term, 1814. What particular circumstances of fraud and imposition will render a bond void in law, it would be impossible to state *a priori*. They are infinitely diversified, and must of necessity be entrusted to the sound and legal discretion of the Judge who tries the cause. For this reason alone, therefore, we all think there ought to be a new trial.

NOTE.—Upon the first point, see *Torrence* v *Graham*, 1 Dev. & Bat. 284.

Mathews v *Marchant*, 3 Dev. & Bat. Rep. 40. On the second point, see *King* v *Bryant*, 2 Hay. Rep. 394. *Logan* v *Simmons*, 1 Dev. & Bat. Rep. 13. *Gibson* v *Partee*, 2 Dev. & Bat. Rep. 530.

THE GOVERNOR TO THE USE OF GABIE *vs.* MEILAN, JOCELYN AND FOOTE—Page 464.

In an action against an administrator upon an administration bond, which described his intestate as N. R., the plaintiff may give in evidence a judgment confessed by the administrator in a suit brought against him by the plaintiff, wherein his intestate was described as N. W. R., the court being satisfied that N. R. and N. W. R. meant the same person.

The variance, if any, should have been taken advantage of, when he was sued as administrator. An administration bond taken payable to the Governor at the time when such bonds were required to be taken payable to the Chairman of the County Court, may be enforced as a bond at common law.

Debt on bond entered into by Meilan, as administrator of Nathaniel W. Ruggles, otherwise called Nathaniel Ruggles, and N. W. Ruggles. The breaches assigned were, not making and exhibiting an inventory within ninety days;—not truly administering and making a just account of his administration within two years. Pleas—"condition performed, and *plene administravit*."

On the trial of the cause in New Hanover Superior Court, it was admitted that the breaches assigned had been committed; whereupon the plaintiff, in order to show the damage he had sustained, offered in evidence the record of a recovery he had obtained against Meilan, as administrator of Ruggles. The defendant objected to this evidence, on the ground that he had been appointed administrator to Nathaniel Ruggles, in which form the bond was given, and that the record offered in evidence shows that a suit had been instituted against him by Gabie, as administrator of N. W. Ruggles, and judgment rendered against him as *executor*.

It was agreed by the parties that if the evidence be deemed admissible, then the following reason in arrest of judg-

ment shall be considered as having been regularly entered, and be decided by this court, for the sake of avoiding delay.

That the bond is made payable to Nathaniel Alexander, the Governor of the State and to his successors in office; whereas, it should have been made payable to the chairman of the County Court and his successors in office.

On the trial in New Hanover, it was proved that a person named Nathaniel W. Ruggles, called N. W. Ruggles, died in Wilmington in September, 1807, and that Meilan, about three months after his death, took into his possession his effects, collected and paid his debts, and acted in all respects as his administrator; that no other person by the surname of Ruggles was recollected to have lived or died in New Hanover county; and that no other letters of administration have been granted in that county to Meilan, except those before described.

Taylor, C. J. delivered the opinion of the court:

This is a struggle to avoid the payment of the plaintiff's debt, upon two objections purely technical; and to be sure, if they are founded in point of law, they must prevail, whatever the justice of the case may call for otherwise.

The first objection goes to the introduction of the judgment recovered by *Gabie* v *Meilan*, because the suit was brought against him as administrator of N. W. Ruggles, and the judgment was entered against him as *executor*. The inference drawn from this ground of objection is, that Meilan is not liable as administrator of Nathaniel Ruggles for a recovery had againt him in a suit, which described him as the administrator of N. W. Ruggles; that the administration bond binds him only as the administrator of Nathaniel Ruggles, and he cannot otherwise be made liable.

If the objection be founded on the idea that there were two persons of the name of Ruggles, that is repelled by the evidence spread upon the record in this case, and by the manner of describing him in the declaration, as Nathaniel W. Ruggles, otherwise called Nathaniel Ruggles, and N. W. Ruggles.

The ground of variance is equally untenable, because, if

any advantage could have been taken of it, the proper time was, when Meilan was sued as the administrator of N. W. Ruggles. But, instead of availing himself of the variance between the administration bond, and the way in which his intestate was described in the writ, he waived all objection on that score, and expressly admitted that he was the administrator of N. W. Ruggles, by confessing a judgment in that character. The objection that the judgment was rendered against him as executor, does not seem to be founded in point of fact. He is so called upon the docket, though a clerical error; but the writ describes him as administrator, and when he signs his name to the confession of judgment, he recognizes the character in which he is sued. We must therefore take it from all these proceedings, that the Nathaniel Ruggles, upon whose effects Meilan administered, is the same Nathaniel W. Ruggles, as whose administrator he confessed a judgment to Gabie; to enforce which judgment is the object of the present suit. According to the plainest rules of pleading, Meilan is *now* estopped to deny this fact. Thus if a defendant omits to plead a misnomer, he may be taken in execution by a wrong name, 2 Str. 1218. If A. give a bond by the name of B. and being sued by the name of B., plead the misnomer, the plaintiff may estop him by saying that he made the bond by the name of B. Comyn's Dig. Abatement F. 17.

With respect to the reason in arrest of judgment, we do not, on full consideration, think it ought to prevail. It is true, that the act of 1791, directs such bonds to be made payable to the Chairman of the court, changing in that respect the act of 1715, which directs them to be made payable to the Governor. But the act is merely directory, and does not render them void, or voidable, if taken otherwise. The defendants have then given a bond in a form which the law did not compel them to do; but it is conditioned for the most just and useful purposes, viz. to dispose of the goods of the deceased among his creditors and next of kin; and the defendants have entered voluntarily into such engagement. We think the law will lend its aid in enforcing this

bond; and that in reason and principle, the case of *Johnson* v *Laserre*, is an authority for the plaintiff. "Error upon a judgment in a *scire facias*, sued in the Common Pleas by Laserre, upon a recognizance entered into by Johnson to Laserre, in which judgment was given for Laserre. Johnson, the defendant, in the Common Pleas, prayed there *oyer* of the recognizance and the condition, which condition recited that Hugh Howard, and Thomasere, his wife, executors of John Langston, had sued a writ of error returnable in the King's Bench, upon a judgment recovered in the Common Pleas by Laserre against Howard and his wife; if, therefore, the said Howard and his wife prosecute the writ of error with effect, &c. and paid the sum recovered, and also the damages and costs that should be awarded, if the judgment should be affirmed, &c. that then, &c. after which *oyer* had, the said Johnson pleaded in bar of the *scire facias*, the act of 16 & 17 Car. 2, c. 8, to prevent arrests of judgments, and superseding executions, and the proviso therein, that that act should not extend to any writ of error to be brought by an executor, &c. *per quod*, the said recognizance taken contrary to the said statute *vacua in lege* existit. And upon demurrer, judgment was for the plaintiff Laserre, in the Common Pleas; and Mr. *Strange*, for the plaintiff in error, insisted that executors by the act of Car. 2, were not obliged to enter into recognizances upon writs of error brought by them, upon judgments obtained against them, and that this appearing to be such a recognizance, was void. But per *totam curiam*, if a man will voluntarily enter into such a recognizance, it is good at common law. And judgment was affirmed." 2 Ld. Raym. 1460.

Upon the whole matter, therefore, the court are of opinion, that the Clerk of New Hanover Superior Court be directed to enter up judgment against the defendants for the sum of £5,000, the penalty of the bond, to be discharged by the payment of £594 12 9, with interest from the 1st of January, 1810, until paid.

NOTE.—Upon the last point, see *Branch* v *Elliott*, 3 Dev. Rep. 86. *Justices* v *Armstrong*, Ibid 284. *Williams* v *Ehringhaus*, Ibid 297. *Threadgill* v *Jennings*, Ibid 384. *Vanhook* v *Barnett*, 4 Dev. Rep. 268.

MARINER AND WIFE *vs.* BATEMAN AND REA--Page 464.

Persons named executors in a will, which has been proved, who fairly contest the probate of another paper, produced as a will after a considerable interval, and under circumstances fitted to awaken suspicion, though afterwards established, will be permitted in equity to charge the expense of litigation upon the estate.

This was a bill in equity, the object of which was to exonerate the complainants from the payment of certain costs, and charge them upon the estate of Henry Norman, dec. which costs had been incurred from contesting the probate of the will of the said Henry, under the following circumstances.

Henry Norman made a will, in which he appointed his wife Sarah, one of the complainants, together with two other persons, his executrix and executors. This will was admitted to probate at April sessions of the County Court, in 1804, and the executors proceeded to transact the business of the estate.

At October sessions of the same year, another will was offered for probate, in which the defendant Bateman was appointed one executor, the complainant Sarah another, and the defendant Fanny Rea a devisee and legatee. The probate of this will was contested by the complainants (Sarah being now married to Mariner) but it was, after several trials in the County and Superior Court, finally established; upon which the complainants qualified as executors to it, together with the defendant Bateman. The expense of these various litigations amounted to near one thousand dollars.

Taylor, C. J. delivered the opinion of the court:

Costs are made discretionary in this court, with a view that they may follow as nearly as possible the conscience of the demand; and there is no instance of trustees being chargeable with them where they have acted fairly, although they fail in establishing a claim. 1 Ves. jr. 205.

The conduct of these complainants was such as might have been reasonably expected from executors who were disposed to do their duty; for seeing a will coming forward for probate at a considerable interval after the testator's death, and after the notoriety of one will being proved, it was natural to suspect the fairness of the attempt, and just to resist it, until it was established by testimony. It would be a great discouragement to executors to oppose even forged wills, if it were understood that it must be done at the private hazard of paying the costs out of their own estate, in the event of a failure. Where their conduct is wanton and litigious, and the court can collect that from the facts of the case, it will require the application of a different rule.

All these expenses have arisen from the circumstance of the testator's having left two wills, without giving any reason to the person who had the custody of the prior, to believe that it was revoked by a subsequent one. It is equitable, therefore, that the costs should be paid out of his estate. Where a testator by his will has occasioned difficulties, the costs ought to be paid out of his assets. *Studholme* v *Hodgson & al.* 3 P. Wms. 303. *Jolliffe* v *East*, 3 Bro. Ch. c. 25. *Pearson* v *Pearson*, 1 Schoale & Lefroy, 12.

Note.—See *Leigh* v *Lockwood*, 4 Dev. Rep. 577. *Clapp* v *Cobb*, 1 Dev. & Bat. Eq. Rep. 177. *Ralston* v *Telfair*, 2 Dev. & Bat. Eq. Rep. 414.

ORR'S HEIRS *vs.* IRWIN'S HEIRS AND DEVISEES—Page 465.

A bill in equity will lie in the courts of this State to compel the conveyance of lands in Tennessee, if the defendant be within the jurisdiction of the court.

This was a bill in equity for the specific conveyance of a tract of land, for which the bill charged that R. Irwin had, in his life-time, procured a grant to issue in his own name.

The executors pleaded to the jurisdiction of the court that the lands lay in Tennessee, the courts of which State could alone take cognizance of such a claim.

Taylor, C. J. delivered the judgment of the court:

Though it may be admitted that the decree of this court cannot act directly upon lands, yet its power may be exercised over all those persons who are within its jurisdiction. So that if a decree should be made ordering a conveyance, the party disobeying it, might be attached for the contempt. It seems to be a well settled principle, that any contract made, or equity arising between parties in one country, respecting lands in another, will be enforced in the Chancery Courts of that country where the parties reside, or can be brought within the jurisdiction of the court. 1 Eq. Ab. 133. 1 Vern. 75, 135, 419. 3 Atk. 589. 3 Vesey, j'r. 170.

To these cases may be added, a decision made by the late Chancellor Wythe, in Virginia, which may be cited as equal in point of authority, if not superior to any of the British decisions, from the luminous and conclusive reasoning on which that upright and truly estimable Judge founds it,

Clarum & venerabile nomen,

His words are, "the fourth question is, whether a Court of Equity in this Commonwealth can decree the defendants, who are within its jurisdiction, to convey to the plaintiffs lands which are without its jurisdiction?

"The power of that court being exerciseable generally over persons, they must be subject to the jurisdiction of the court; and moreover, the acts which they may be decreed to perform, must be such as, if performed within the limits of that jurisdiction, will be effectual.

"That the defendants are subject to the jurisdiction of the court, and amenable to its process, hath not been denied; and that a charter of feoffment containing a power of attorney to deliver seisin, a deed of bargain and sale, deeds of lease and release, or a covenant to stand seised, executed in Virginia, would convey the inheritance of lands in North Carolina, as effectually as the like acts executed in that State would convey such inheritance, hath not been denied, and is

presumed, until some law there to the contrary be shewn, because the place where a writing is signed, sealed and delivered, in the nature of the thing, is unimportant.

"If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey lands in North Carolina, why may not a Court of Equity in Virginia, decree that party, regularly brought before that tribunal, to perform the act?

"Some of the defendants' counsel supposed, that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. To this shall be allowed the force of a good objection, if those who urge it will prove that the sovereignty of that State would be violated by the Virginia Court of Equity decreeing a party within its jurisdiction, to perform an act there, which act, voluntarily performed any where, would not be such a violation.

"The defendant's counsel objected also, that the court cannot, in execution of its decree, award a writ of sequestration against the lands in North Carolina, because its precepts are not authoritative there. But this, which is admitted to be true, doth not prove that the court cannot make the decree; because although it cannot award such writ of sequestration, it hath power confessedly to award an attachment for contempt, in refusing to perform the decree. This remedy may fail, indeed, by the removal of the defendants out of the court's jurisdiction, yet such a removal after the party had been cited, is not an exception which can be interposed to prevent a decree. A court of common law may enter up a judgment against him, who, by removal of his goods and chattels with himself, after having pleaded to the declaration, or after having been arrested, rendereth vain a *ca. sa.* or a *fi. fa.*

"From a contrary doctrince to that now stated and believed to be correct, may result both inconvenience and a failure of justice.

"1. A man agrees to sell to another, or holds in trust for another, lands in Georgia, Kentucky, or one of the new States north west of the Ohio, but he cannot be decreed to

execute the agreement, or to fulfil the trust, by any tribunal but that in one of those countries, several hundred miles distant from the country *ex. gra.* North Carolina, in which, both parties, and the witnesses to prove matters of fact controverted between them, reside; like and greater inconveniencies may happen in numberless other cases; whereas a case can rarely if ever occur, the discussion of which can be so convenient to the defendant in any other, as in his own country.

"2. An agent employed to purchase lands for people intending to emigrate to America, or for others, having laid out the money deposited for that purpose with him by them, and having taken conveyances to himself, or to a friend for his use, refuseth not only to make title to his constituents, but also to discover the lands purchased. They meet with him in one of the States, and in the Court of Equity there, file a bill against him, praying for a discovery and a decree for conveyance; he excepts to the jurisdiction of the court as to any lands not lying within that State, and denieth by answer that any lands within that State were purchased by him for the plaintiffs, which was true. The bill in such case, according to the doctrine of the defendants' counsel in the principal case, must be dismissed, and this must be the fate of every other bill, until he shall have the good fortune to find out in what State the lands purchased are; and if they be in several States, a bill must be filed in every one. If to this be said, the court may compel a discovery though they proceed no farther, the answer is, that this is directly the reverse of the rule in the Court of Equity, viz. that the court, when it can compel a discovery, will complete the remedy, without sending the party elsewhere for that purpose, and decree to be done, what ought to be done, in consequence of the discovery." Wythe's Rep. 143. *Farley* v *Shippen.*

We have transcribed thus largely from the work of the Chancellor, because it is not in every library, and the discussion of the question, which is new in this court, being the most able and copious we have any where met with, cannot fail to be instructive to the student, and acceptable to the practitioner, who will both be disposed to allow, that the ex-

cellence of the matter atones for the length of the extract.

Plea overruled with costs.

NOTE.—See *Blount* v *Blount*, 1 Hawks, 365. *Boyd* v *Hawkins*, 2 Dev. Eq. Rep. 329.

DUNWOODIE'S EX'RS. *vs.* CARRINGTON—Page 469.

One, who hires a negro from another, by which he has obtained possession of the negro, shall not dispute the right of the hirer, until he has restored the possession.

The executor's assent to the first taker is an assent to all subsequent takers of a legacy, limited over by way of remainder in executory devise. But this rule does not prevail, where after the death of the first taker, the executor has a trust to perform arising out of the property, which therefore must be subjected to his control and of course he must have the legal title.

Detinue for five negroes. A special verdict was found, stating the proofs and circumstances at great length; but the following extract is all that is necessary to a thorough comprehension of the points in the cause.

Warren the plaintiff, as executor of Dunwoodie, hired the slaves sued for two years successively to the defendant, who on the expiration of the last year, refused to restore them, resting his defence on the last will of Henry Dunwoodie, the plaintiff's testator, in which he devises all his property to his wife Elizabeth during her life, and after her death the negro Jude, one of those sued for and mother to the rest, to his grandson Absalom. To his grandson James, he bequeaths fifty pounds after the death of his wife, to arise out of his estate. To his son John one shilling; to his daughter Nancy one shilling; and to Sarah Grissom and his grandson John Jackson, the balance of his estate, after his wife's death.

Elizabeth the widow, after the death of her husband, lived with one John Jackson, who during her life kept Jude in

his possession to her use, and at her death delivered her, together with the children born since the death of the testator, to the plaintiff. The widow died in 1809, and the years for which the negroes were hired to the defendant were 1810 and 1811. It was proved that the possession of the widow, or of Jackson for her use, was by the consent of the plaintiff.

The case was argued by *Norwood* for the plaintiff, and *Nash* for the defendant.

Taylor, C. J. delivered the opinion of the court:

We take it to be very clear, that, under the circumstances of this case, it is not competent in the defendant to dispute the title of the plaintiff. As between those parties, at all events, the plaintiff is entitled to recover, because his right has been admitted by the defendant and possession taken under it. That possession he is bound to restore to the person from whom he obtained it; and cannot, with any shadow of justice, consider himself a trustee for any one, who in his conception, may have a better right to the property.

As to the assent, the general rule cannot be doubted, that where a legacy is limited over by way of remainder or executory devise, the executor's assent to the first taker will be considered an assent to all the subsequent takers or legatees. But this rule cannot prevail, where, after the death of the first taker, the executor has a trust to perform, arising out of the property and which cannot be performed, unless the property is subjected to his control. Here several pecuniary legacies are to be raised out of the general estate after the death of the wife, and therefore at that period, all the property bequeathed to her, must of necessity return to the executor, to enable him to perform the trusts of the will; and this point was so adjudged in this court in the case of Watson from Johnston county.

Note.—See on the first point, *Sacarusa* v *King*, ante, 451, and the case referred to in the note. On the second point, see *Allen* v *Watson*, 1 Murph. Rep. 189. *Ingram* v *Terry*, 4 Hawks, 122. *Alston* v *Foster*, 1 Dev. Eq. Rep. 337. *Smith* v *Barham*, 2 Dev. Eq. Rep. 420. *Saunders* v *Gatlin*, 1 Dev. & Bat. Eq. Rep. 86. *Conner* v *Satchwell*, 4 Dev & Bat. Rep. 72. *Lewis* v *Smith*, Ibid 326.

White v *White*, Ibid 401. *Lewis* v *Smith*, 1 Iredell's Rep. 145, where there is a legacy for life and no remainder, the assent of the executor enures only to the benefit of the particular tenant, and the executor is entitled to the possession of the chattel again to perform the other trusts of his office. *Anonymous*, 2 Hay. Rep. 161. *James* v *Masters*, 3 Murph. Rep. 110. *Black* v *Ray*, 1 Dev. & Bat. Rep. 334.

HAMILTON, EX'RX *vs.* SHEPARD ADM'R OF SMITH—Page 471.

The plea of the statute of limitations may be pleaded, after issue joined, upon payment of full costs, under peculiar circumstances.

This is an action on the case in the nature of deceit: and it is moved by the defendant's counsel that he be permitted to plead the act of 1789 barring claims against the estates of deceased persons. He does not state that he was directed by his client to make this defence, but he does state that the defendant believing the defence open to him, has attended with the evidence necessary to support it. The suit has been depending two years; and it is submitted to the Supreme Court to say whethr the plea shall now be entered, and if so upon what terms?

TAYLOR, C. J.:—The courts have of late years exercised much liberality in the practice, as it respects the addition of pleas, and the amendment of pleadings. Its general tendency is to advance the claims of justice, by putting the trial of a cause upon its merits; and as the Court may prescribe the terms of the permission, the power may be so employed as to prevent delay and tax inattention. The cases of *Reed* v *Hester* and *Johnston* v *Williams*, heretofore decided in this court, are authorities for adding the plea in the present instance. It therefore may be added, upon payment of all costs up to the time of the application.

NOTE.—See acc. *Reid* v *Hester*, Conf. Rep. 488. *Johnston* v *Williams*, Ibid 518.

HARRIS *vs.* PETERSON—Page 471,

A notice to take the deposition of a witness living in Georgia on one of three successive specified days, is sufficient.

The question reserved in this case was, upon the sufficiency of a notice to take a deposition. The notice was to take the deposition on one of three days which were specified, viz. as days of the week and of the month, at a certain house in Putnam County in the State of Georgia.

Taylor, C. J.—As the design of notice is to give the party the benefit of a cross-examination, its regularity must, in a great degree depend upon the circumstances of the case, and can oftener be tested by the dictates of good sense and sound discretion, than by any general rule applicaple to all cases. It could not for example safely be laid down as a rule, that such a notice as this might be practised in all cases; for if the parties and witness lived near together, there would not only be no necessity for it, but it might tend to ensnare the party noticed, and aid the other in procuring testimony in a fraudulent manner. But where the witness lives at a great distance from the parties, and only one day is named, many accidents may intervene to prevent his arrival there; whereby the deposition is not taken, and justice is delayed. All this is avoided by naming two or more successive days; and as the witness lived in Georgia, in this case, we are of opinion that the notice was good.

Note.—See *Kennedy* v *Alexander*, 1 Hay. Rep. 25. *Bedell* v *State Bank*, 1 Dev. Rep. 483.

FORSYTH *vs.* M'CORMICK--Page 472.

An appeal bond, which leaves out the most effective part required by law, to wit: that the securities shall be discharged on the performance by the appellant of the judgment above, is insufficient.

The defendant appealed from the County to the Superior Court, and executed an appeal bond, the condition of which was, "now if the said W. C. M'Cormick do prosecute this said appeal with effect, then the above obligation to be void, otherwise to pay such costs and charges, as by law in such case is required."

On a motion made in the Superior Court to dismiss the appeal for the insufficiency of the bond, the case was referred to this court, where it was submitted without argument and the opinion of the court was delivered by

TAYLOR, C. J.—The provisions of the act of 1777, § 82, are so explicit on this subject as to leave no room for argument or doubt. The giving the bond and two securities in the manner directed, is in the nature of a condition precedent, for the words are, "that before obtaining the appeal;" and the condition must be for prosecuting the same with effect, and for performing the judgment, sentence, and decree, which the Superior Court shall pass or make thereon, in case such appellant shall have the cause decided against him. The condition of the bond taken in this case does not provide for performing the judgment of the Superior Court, and it would be satisfied by prosecuting the appeal with effect, and in the event of failure, paying merely the costs and charges. This omission is too substantial to be overlooked, for in reality the main purpose for which an appeal bond is required is totally unprovided for. We think that every bond must comprehend all the objects required in the act, we do not say, in the very words of the law, but substantially, they must be secured before the appeale an be rightly constituted the appellate court.

Let the appel be dismissed.

NOTE.---See acc. *Waller* v *Pittman*, Conf Rep. 107. *Orr* v *McBride*, 3 Murph. Rep. 235.

July Term, 1816.*

HAYWOOD vs. CRAVEN'S EX'RS—Page 557

A charitable purpose under the statute of 43rd Elizabeth must be so described in a will, that the law will at once acknowledge it to be such.

Wherever the intention of a testator is to create a trust which cannot be disposed of to charitable purposes, and is too indefinite to be disposed of to other purposes, it reverts to the heir at law or next of kin. Hence a direction by a testator that his slaves shall be set free, or a bequest to his executors of his slaves in trust that they will set them free, is against public policy and void, and the slaves consequently result to the next of kin.

John Craven, by his last will and testament, gave and bequeathed to James Turner, Nathaniel Macon, and John Hall, to the survivors of them and the executors of the survivor, immediately after his death, three of his slaves, viz. Prince, Hannah, and Grizzy, and their increase, *in trust*, to have them emancipated and set free by the laws of the State, in such manner and at such time, as they shall think fit. He also devised to his said executors the half of Lot No. 223 in trust for the use of Hannah and Grizzy, and a quarter of an acre of land in trust for the use of Prince. To his sister Margaret Craven he left his town house, during her life time, and the residue of the lot not before disposed of together with a plantation and thirty slaves, and whatever else was not given away by the will. After sundry bequests, he gives and bequeaths, after the death of his sister, to his executors, the survivor of them and the executor of the survivor, twenty nine slaves and their increase, *in trust*, to have them set free by the laws of the State, in such time and in such manner as they may thing proper--He gave also to his executors after the death of his sister, his

*Taylor, C. J. gave no opinion in many of the Cases decided at this Term, being prevented by indisposition in his family from attending the consultations.

plantation tools, and implements of agriculture, in trust for the use of such of the male slaves as were, at the date of the will, of the age of sixteen years or upwards, and for the females of all ages, to hold the same as naked trustees, for the use and benefit of the said negroes and their heirs for ever. The executors are empowered to bind out all the male negroes at sixteen years of age to different trades, until they attain the age of *twenty one*, when they are to be emancipated: he directs his executors to sell his house and lot in town after the death of his sister, on a credit of five years, and the interest to be collected annually and applied to the use of Prince, Hannah, and Grizzy. He also gives to his executors eight acres of land in trust for Grizzy, and directs them to sell his furniture, or if necessary, his stock for the payment of his debts; and in the event of his sister dying before him, requires his will to be carried into immediate execution; his slaves to be lawfully liberated as soon as his executors can find it convenient to do so.

The testator died and his sister Margaret was put into possession of the property, and by her last will and testament devised and bequeathed all her property to the complainants Stephen and Dallas Haywood; the former of whom, after the death of the testatrix, had the will proved, and was duly appointed administrator with the will annexed. Prince and Hannah were emancipated by the County Court during the life time of Margaret Craven. Grizzy died a slave.

The bill prays that the defendants may be decreed trustees for the benefit of the complainants, and compelled to deliver unto them the land and slaves, and account for the profits.

To this Bill the executors demurred.

A Henderson in support of the demurrer.

No trust can result for the benefit of the heir at law or next of kin of John Craven, for if the devise is to an improper use, the Court will direct it to be applied to a proper one.—1 Salk 162—1 Coke, Porter's case, 25.

The testator has signified most expressly his will that no benefit should devolve upon his heirs, beyond the provision

he has made for them. The court will substantially carry the will into execution, if it cannot be done literally, or in the form and manner directed by the testator. Where the substance of the will may be effectuated, the rule of this Court is to perform it *cy pres*.—2 Vern. 266.

It is a well settled rule in the British Court of Chancery that when a devise is to a superstitious use and made void by statute; or to a charity and made void by the statute of mortmain, then it shall belong to the heir at law or next of kin; but where it is in itself a charity, but the mode in which it is to be disposed of is such, that by law it cannot take effect, the officer of the crown is directed to specify the charitable manner in which it may be disposed of. Ambler 228. So where the charitable object is uncertain. Ibid. 712. A sum of money was devised for such charity as testator had by writing appointed, and no such writing being to be found, the King appointed the charity.—1 Vern 224. When the testator has empowered other persons to dispose of his estate the heir at law is disinherited, as much as if he had disposed of it himself, and there can then be no resulting trust.—2 Atkyns 562.

The court will not decree in favour of the complainants unless such a course is clearly directed by law, for the trust being of the most humane and benevolent kind, is entitled to a construction of correspondent liberality. As the testator has sought for nothing to be done except in pursuance of the law, it is possible that the slaves may yet be emancipated by the Legislature; or the excutors may procure their liberation by sending them to some other State. They ought to be allowed full time to make every proper effort to obey the will of their testator, and the discretion of the court cannot be more wisely exercised than in holding up the bill till this is done.

Brown and *Gaston* for the complainants.

A court of Equity puts the same construction upon *trusts* that a court of Law does upon legal estates. 2 Burr. 1108. 9. It must follow the law and cannot adopt different rules for the transmission of estates. 2 Vesey, jr. 426. Where a

case is sent to a court of law for their opinion, it must be stripped of all appearance of trust, otherwise that court will not answer. 4 Vesey, jr. 788.

Were this case so sent, it must be stated as a devise to Margaret Craven for life, and after her death, these slaves to themselves, and all the rest of the testator's property to them too. But in every gift there must be a *donor*, a *donee*, and a *thing* given. Plow. 563. The donee must have capacity to take or hold. C. Lit. 2, 6. Where he has neither, the conveyance, of whatever sort it may be, is absolutely void. An alien may purchase lands but he cannot hold ; by the civil law he can do neither, and a conveyance to him is void. 1 Bl. 371. It makes no difference whether the incapacity is created by the common law or by statute. The property must remain in the donor or devolve upon his heir at law or next of kin, whether the attempt to transfer it is made at law, or by way of trust or will. 3 Atkyns 806. 2 Vesey, jr. 482. If then there is no person, who by the will, can take, the heir at law does ; and trustees who are to have no profit cannot even present to a living. 2 Vesey, jr. 282.

A slave is considered in law as a chattel and not as a person. He cannot maintain an action ; he passes under a bequest of personal estate, and is levied upon and sold under a *firie facias* to take the goods and chattels. To kill him wilfully and maliciously was only a trespass. Act 1741, c. 24. It was declared to be murder by 1791, c. 4, and ousted of clergy 1801, c. 21. Even if the master sets him free, he shall be treated as a slave—1741, c. 21. The holding of property for him, whether by trust or otherwise, is illegal.—Conf. Rep. 353.

By the common law, a monk professed can neither take nor hold—C Litt. 36.. He is considered as having once existed, but not as now existing except for special purposes. The case of property given or limited to a monk professed is exactly in point, only not so strong. An immediate estate given to a monk is void—Plow. 35. So of a devise—1 Str. 337. 2 Roll. 415.

If a devisee is incapable of taking when the estate ought to vest, the devise is void. Plow. 345. Cro. Eliz. 422. 9 Mod. 167, 181. 1 Str. 369. 1 Salk. 227. In the case of a descent, a person not in *esse* may take when he comes in *esse;* but in the case of a purchase it is forever gone—1 Str. 378. The legislature has not said that a devisee may take without being in *esse*, at the time the estate ought to vest; but it has been said, and the courts have held, that a child in *ventre sa mere*, shall be considered as in *esse*, and therefore may take as a purchaser. This decides the question as to all the negroes who had not been set free and enabled to take at the death of Margaret Craven, when the property ought to have vested in possession. But it may be said in reply, that this depends upon the rule of law that the freehold shall not be in abeyance, but that the inheritance may; and that although an immediate devise to a person incapable of taking shall be void, yet a remainder shall be good, if the person was capable of taking when the particular estate is determined, as Prince, and the others who were emancipated, were in the present case. This is true to a certain extent; but the remainder man must be in *esse* or in *potentia propinqua*.—Noy 123. Plow, 27. 2 Co. 51. Here the devise of the negroes and lands are plain perpetuities; to the trustees it is in fee without the power of alienation. The trust is of the negroes and their increase until they are set free, which may not happen in 57 years, is equally so. The executors themselves are the persons who may set these negroes free—the county court only grants a license to do so. But while the executors hold this property, no one can call them to account; so that as they are bare trustees and cannot sell, it will remain in their hands as long as they please, unalienable. If such a trust is valid, it must be equally so when created by deed, and no doubt, it would become a common way of forming perpetuities. It cannot be imagined that the County Court would grant a license to set those negroes free; for it can only be done fo meritorious services. But some of them are very young, and many in contemplation, not yet born. It is equally improbable that the Legis-

lature would do so contrary to the rule they have laid down for the Courts. To carry this trust into effect then, what is it but setting all these slaves free contrary to law? It is evident that the executors were not intended to be benefited by the labour of the slaves or the cultivation of the land; but the slaves themselves were to have the whole. Now the devise of the whole profits of a thing, is both in law and equity a devise of the thing itself.

The cases on charitable uses bear no analogy to the case before the court. The objects to which such devises may be applied are enumerated in the statute 43 Eliz. and are all consistent with the policy and welfare of the country. But the object of this devise, so far from being compatible with the national policy, is absolutely forbidden by a variety of statutes. Acts 1741, 1777, 1779, 1788.

The rule applicable to this case is, that wherever a conveyance is made on particular trusts, which by accident or otherwise cannot take effect, a trust will result. 3 P. Wms. 20, 252. 1 Bro. Ch. Rep. 508.

A. Henderson and *Murphey* in reply. The cases relied upon to show that there must be a donee capable of taking, relate to an immediate gift by deed. But the principle is different where trustees are appointed by will, who take for the benefit of the donee, and hold till his capacity arises. Thus in Porter's case 1 Co. The trustees held the land for the benefit of a corporation not then created. And if the contingency of emancipation is too remote, why was not the devise in the same case held void? for there two acts were to be done,—an act of incorporation to be procured, and a license to hold land obtained. Yet it was considered not to be too remote. There are cases where a charity was never created, yet the court would not take the estate from the trustees against the intention of the testator.

In 1 Bro. Ch. C. there was a devise for a Bishoprick in America, which it was contended there was no probability of being established, yet the Chancellor held the money in Court, and would not allow the executors to have it, and the money was held in court for 60 years. In 2 Bro. Ch. C.

498, a demise was held up until a license to hold in mortmain could be obtained. The case in Ambler 571 is a devise in trust for a charity not in *esse;* and before the trust could be executed, it was necessary to obtain a license to purchase ground in mortmain, and also a charter of incorporation; yet the devise was supported. The contingency in this case must happen within the period established for executing devises, viz. a life or lives in being and 21 years afterwards, for the slaves to be benefitted by it are all named in the will. When the question is as to the remoteness of an event, it is proper to consider the nature of the property bequeathed—2 Fearne 369. All the doctrine relative to this part of the case is fully discussed in 2 Call 319.

The cases cited to prove that a trust results to the heir where the devise cannot take effect from accident, confine the rule to those instances in which the accident is such as renders it impossible to execute the will of the testator, as the death of the devisee or legatee, &c.; or to those where lands are devised for a particular purpose, that which remains after the purpose is satisfied results.

It is not denied that trusts have the same construction with legal estates in Courts of Equity, but this position is too broadly laid down on the other side, and to be rightly understood, it must be received with some qualification. The intervention of trustees will not convert an estate for life into an estate of inheritance; it will not enable the testator to create a perpetuity, nor will it change the properties and incidents of an estate. The rule in its general bearing is confined, however, to trusts executed and not executory. In the latter sort, a difference of construction is allowed in order to effectuate the intent of the testator. Cases Temp. Tal. 19.

PER CURIAM.*

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* SEAWELL, CAMERON, and HALL, J. gave no opinion in this case, the two former having been consulted while at the bar, the latter being one of the executors of Mr. *Craven*. The cause was decided by TAYLOR, C. J., LOWRIE and DANIEL, J.

As those mebers of the court, who alone can decide in this case, have no doubt on the subject, and both parties seem anxious to avoid further delay, we see no reason to postpone the judgment; although it would have been more consonant to the respect with which we have listened to the able arguments on the part of the defendant, to have stated particularly wherein they have seemed to us inconclusive, and failed to produce conviction in our minds. But this could only be done by the delay of a term, as we have ascertained the general principles on which we do agree a few minutes only before coming into court, and as this is the last day of the term, we must give the opinion in general terms or not at all.

We are of opinion, that the trust attempted to be created by the will of Mr. Craven is void in law, not only as contrary to its general policy, but as repugnant to positive provisions by statute; for the law has pointed out one method only in which slaves can be liberated, act of 1741, c. 24, and the principle on which it is permitted, can by no construction be applied to the case before us. The same act directs the slaves to be sold if the owner sets them free in any other manner. With respect to the cases decided upon the 43 Eliz. it is believed that not one can be found in which a Court of Equity has executed a charitable purpose, unless the will so described it, that the law will acknowledge it to be such. The disposition must be to such purposes as are enumerated in the statute, or to others bearing an analogy to them, and such as a court of chancery in the ordinary exercise of its power, has been in the habit of enforcing. But wherever the intention is to create a trust which cannot be disposed of to charitable purposes, and is too indefinite to be disposed of to any other purposes, the property remains undisposed of, and reverts to the heir at law or next of kin, according to its nature. This is the construction of Courts of Equity, even upon charitable dispositions.—10 Vesey jr. 552. But for the reasons already stated, we do not perceive any resemblance between them and this case. It must therefore be governed by the general rule, and as the trustees have no

interest, they must be considered as holding the property for the benefit of those on whom the law casts the legal estate.

Demurrer overruled.

NOTE—See *Wright* v *Lowe*, 2 Murph. Rep. 354. *Huckaby* v *Jones*, 2 Hawks 120. *Turner* v *Whitted*, Ibid 613. *Stephens* v *Ely*, 1 Dev. Eq. Rep. 493. *Redmond* v *Coffin*, 2 Dev. Eq. Rep. 437. *White* v *White*, 1 Dev. & Bat. Rep. 260. *Sorrey* v *Bright*, 1 Dev. & Bat. Eq. Rep. 113. *Pendleton* v *Blount*, Ibid 491. *White* v *Green*, 1 Iredell's Eq. Rep. 45. *State* v *Gerard*, 2 Ibid 210. By an act passed in 1830, (1 Rev. Stat. ch. 111, sec. 59,) a testator may emancipate his slaves by his last will under certain restrictions.

CUTLER *vs.* BLACKMAN—Page 566.

The presumption of a grant can never arise, unless the party claiming has been in the actual possession of the land.

This ejectment was tried before DANIEL, J. at Sampson Superior Court, where the following case was disclosed by the testimony.

The plaintiff produced a grant to James Spiller from the State, dated in the month of October, in the year 1787, and deduced title regularly from the grantee. Neither the grantee nor any person under him, has ever had any actual possession of the premises in dispute. The defendant claims under one Marley, to whom a grant issued from the State in November, 1805, in pursuance of a sale made by the commissioner of confiscated property, who had sold the land described in the declaration as the property of one Thomas Christie, of Ireland, whose property in the state had been confiscated by the act of 1779, c. 2. The defendant alleged that the land in question had been granted by the said Christie at a very early period of the settlement of this county by the Lords Proprietors. It was admitted by plaintiff's counsel that diligent search had been made by defendants, and

that no grant to said Christie, and that the copy of no grant could be found. The defendant and those under whom he claims, have been in actual possession of the land in question ever since the grant issued to the said Marley in 1805. The defendant then offered in evidence the following circumstances to show that the land had been granted to the said Christie. The witness proved that about forty-eight years ago he was called on as a surveyor by one McDonald, who called himself the agent of Christie, to survey a large tract of land including the premises in question. He saw no grant, and no paper was exhibited to him by the said agent except a plat which was of the size and shape of those which were formerly attached to old grants, but smaller than the plats which were usually attached to grants that issued about the time that he was requested to make the survey. There was no seal on the plat. And he does not recollect whether there was any hole through the plat by which it might have been attached to a grant. That he ran the lines agreeably to the plat, and found the two first lines plainly marked all the way and three corner trees;—one of the corner trees was short of the distance mentioned in the plat; the corner trees and all the line trees were uniform in appearance, and bore the marks of great age. On the third and fourth lines he found no marked trees; but he stated it was usual at the time this land must have been surveyed from the age of the marked trees, for the first and second lines only to be marked, and for the plats to be made out without running the third and fourth lines.

The plat above spoken of represented the tract as square. One of the lines would have answered for a line of a large tract granted to Richard Dobbs. He does not know that the other marked line would have answered as the line of any adjoining tract, but the three corner trees designated the land delineated in the plat. He did not know that any grant had ever issued to Christie for the land. He had never seen one or heard that one had issued. Neither Christie nor any person under him ever had actual possession of the land in

dispute. Christie resided in Ireland, and he does not know nor did he ever hear that Christie ever owned any other land in this State. The witness was called on to survey this large tract, because several persons were in actual possession of parts of it; four or five persons were assembled to accompany the surveyor and protect him from the threatened attacks of those who were in possession. The lands represented in the plat and which he ran, were called in the neighborhood and generally understood to be Christie's lands. The persons in possession disputed that Christie had title; and if he had title, their possession gave *them* title. The act of 1779, c. 2, confiscated all the property of Thomas Christie in this State. The infancy of the lessor of the plaintiff in this case has prevented the operation of the statute of limitation. From these circumstances the jury presumed that a grant had issued for the land in dispute to Christie, and found the defendant not guilty of the trespass and ejectment laid in the declaration. Plaintiff moved for a new trial. First, on the ground that no grant can be presumed where there has been no possession of the premises. And second, if a grant can be presumed where there has not been possession, these facts are not sufficient to warrant the verdict of the jury.

Motion overruled by the court, and a new trial refused. Appeal.

Browne, for the plaintiff.

There is no case to be found where a grant has ever been presumed without possession.—Gilb. S. E. 27, 28.—Peake 22, 110, 301, 2. Nor ought such a presumption to be made here, even with possession, so readily as it is in England; because all grants must be registered; and this was required so early as by the great deed of grant. It is observable that one of the evils complained of in the act of 1715, c. 33, § 6, is, that person's pretended title to large tracts of land, upon a bare entry or survey.

Shaw for the defendant.

Possession of lands according to the books always means an actual possession, and refers to a state of things where

the land is generally occupied. But necessity has enacted, and usage sanctioned a different notion of possession in this State; and a constructive possession is equivalent to an actual one. If then, other circumstances are equal, may not a grant be presumed from such possession?

Browne was about to reply but was stopped by the court.

CAMERON, J. delivered the opinion of the court.

It is a very clear rule of law that the existence of a grant cannot be presumed, unless the party claiming the benefit of such presumption proves the actual possession of the land. No such possession having been proved here, the verdict must be set aside and a new trial granted.

NOTE.—See acc. *Clark* v *Arnold*, 2 Hay. Rep. 287. *Dancy* v *Sugg*, 2 Dev. & Bat. Rep. 515.

HENDRICKS *vs.* MENDENHALL—Page 569.

In the execution of a power, it is not necessary to recite that the act is done by virtue of the power, but it is sufficient if it can be done *only* in virtue of it; for the purpose of the act can only be explained by resorting to the power.

Executors are not estopped to claim in their own right lands in a deed which they have endorsed and attempted to confirm, under an express reference to the powers confided to them by the will of the testator.

The premises in the plaintiff's declaration mentioned, are parcel of a tract of 150 acres of land, granted by the State of North Carolina to one Patrick Boggan, on the 19th of October, 1783. The same 150 acres were conveyed by said Boggan to one Thomas Wade, sen., on the 23d October, 1784. The premises in the plaintiff's declaration mentioned, were by said Thomas Wade, sen. conveyed to his son George Wade, by deed of gift, on the 26th August 1786. Thomas Wade, sen., died before George Wade, leaving the said George Wade, Thomas Wade, jun., and Holden Wade,

his only sons and heirs at law. George Wade died unmarried before the year 1790, leaving the said Thomas Wade, jun., and Holden Wade, his only brethren and heirs at law. Mary Hendricks, wife of James S. Hendricks and Sally Wade (they all being lessors of plaintiff,) are the only heirs at law of said Holden Wade, who is also deceased, and the defendant, William Mendenhall, is in possession of lots No. 7 and 19, in the plaintiff's declaration mentioned.

Thomas Wade, sen., before his death, made a will which was duly proven, whereby, among other things, the said Thomas Wade, jun., the said Holden Wade, and three other persons, were appointed executors thereof with authority to them generally to sell and dispose of the testator's real property for the payment of his the testator's debts. Said Thomas Wade, jun., and Holden Wade undertook the execution of said will, and were the only acting executors thereof. After the death of the said Thomas Wade, sen., in the year,—a judgment was obtained by one Eveleigh against the said Thomas Wade, jun., and Holden Wade, as executors of said Thomas Wade, sen., in the County Court of Anson county, of the term of , of the same year, for the sum of . Said judgment was however taken by confession, without the finding or acknowledgment of any plea in favor of said executors upon said judgment. No *scire facias* issued to the heirs of said Thomas Wade, sen., to show cause why execution should not issue upon said judgment against the lands of said Thomas Wade, sen., then descended in their hands. A writ of *scire facias* upon said judgment nevertheless did issue, returnable in said County Court to the term of July, in the year 1790; by virtue of which a levy and sale regularly took place of a variety of lands. In pursuance of the sale so made, one William May, then sheriff of said county of Anson, made and executed a deed to the purchasers. At the same day and place of making said sheriff's deed, the said Thomas Wade, jun., and Holden Wade, on the back of said sheriff's deed, made, executed and delivered, under their respective hands and seals, an instrument of writing in the following words, viz.

"To all to whom these presents shall come. Know ye, that we, Holden Wade and Thomas Wade, as well for ourselves as the other executors and executrix of Thomas Wade deceased, do hereby agree to and confirm the within deed, made and executed by William May, sheriff of Anson county, for the intent and meaning therein specified, by virtue of the power vested in us by the last will of T. Wade, deceased. In witness whereof, we have hereunto set our hands and seals the day and date of the within presents." Signed by Holden and Thomas Wade, as acting executors of T. Wade, deceased.

The tract of 150 acres, first before mentioned, is the same tract of 150 acres which is mentioned and described in the said deed of William May. The same 150 acres were conveyed by the purchases at the said sheriff's sale to one Joshua Prout, on the 28th June 1798. On the 19th July 1809, said Joshua Prout conveyed lots No. 7 and 19, parcel of the said 150 acres and also parcel of the premises in the plaintiff's declaration mentioned, to one George Wade (uncle to the George Wade before named and brother of Thomas Wade sen.) On the 21st January 1811, said George Wade who purchased of Prout, conveyed said lots, No. 7 and 19, to one John Coleman, who on the 9th day of May 1812, conveyed the same lots No. 7 and 19, to the defendant William Mendenhall.

M'Millan, for the defendant, contended, that the endorsement on the deed amounted to an estoppel as to those who signed it, and all claiming under them; and cited Cro. Eliz, 362. 2 Cro. 756, 769.

A Henderson, for the plaintiff.

the executors had no design to estop themselves of their own property, but only of that which they held in their representative character. It was in this character they endorsed the deed, and not as heirs at law. Any other construction would be to make a contract for the parties. Besides, there was nothing on which the estoppel could operate; for the sheriff's deed was void, because there was no

scire facias against, the heirs, and no verdict on the plea of *plene admin.*

The cases cited are of persons acting in their proper capacity. But it is different when they act in a representative character. Comyn's Dig. Tit. Estoppel. Letter C.

SEAWELL, J. We are called upon in this case to say whether the plaintiffs have made out a legal title to the premises in question? and it is admitted they have, unless Holden, their father, parted with it in his lifetime. The only act done by him was an endorsement upon a sheriff's deed, in which the premises were conveyed by the sheriff to a purchaser under an execution, which by the statement appears unsupported by any judgment. The sheriff therefore, had no authority to sell. By this endorsement the father declares that in *virtue of the authority* derived from the will of his testator, he confirms the sale. These if not the words, are at least their substance. Now it may be laid down as the general doctrine in relation to the execution of powers, that it is not necessary to recite that the act is done in *virtue* of the power; but that it is sufficient execution if it can be done *only* in virtue of the power; for though the *form* of executing may not suggest the execution of a power, yet the *purpose* of the act done, can only be explained by resorting to the power; and the maxim is, that it is immaterial whether the intention be collected from the *words* used or the *acts* done. *Quia non refert au quis intentionem suam declaret, verbis, au rebus ipsis vel factis.* And on the other hand, it is equally clear, as this *intention* is to guide and give efficacy to the act, that where a party has both power and interest, and he does not act *purporting* to be in virtue of his interest, that he shall be held to intend *that*, and not to exercise his power. Sir Edward Cleave's case and 10 Vesey, jr. 346, present Lord Chancellor in the case of Maundrell, 2 Maundrell. And this therefore at once disposes of all that has been said upon the subject of estoppel. For if the endorsement only professed to be in execution of a power, the party making it can only be concluded from denying any of the *facts* affirmed by him; and if it should

be suggested that it may operate as the confirmation, the answer has already been given, that the endorsement *excludes* the idea of the exercise of any personal dominion. And indeed it is essential to the operation of every confirmation, that there should be some *estate*, though voidable, for it to act upon; the maxim there being, *confirmatio est nulla, ubi donum precedens est invalidum*, it may make a *voidable* estate good, but can give no effect to one that is *void*. Co. Lit. title *Confirmation*.

The sheriff could convey by his *deed* nothing but what old Wade had, and he having nothing, the deed was void. Whatever title is claimed, from the effect of the endorsement, is at last referrible to the testator's will. The Executors as trustees are only as instruments to effectuate the devise. The father of the plaintiffs has therefore done nothing which, in *law*, has passed his interest, and whether he ought in justice and equity to be restrained from asserting it, must be referred to those courts to whom the jurisprudence of our country has confided the power of deciding. It may turn out that the father was guilty of a fraud; or it may be the case, he acted under a mistake. If the former, he would be compelled to convey. If the latter, it would be unjust he should lose his land.

TAYLOR, C. J. The land sued for in this action was no part of the estate of Thomas Wade, sen. at the time of the judgment against his executors. He had conveyed it in his lifetime to George Wade, upon whose death it descended to his brothers Holden and Thomas Wade. The rectical in the sheriff's deed, therefore, that Thomas Wade, sen. was seised in fee of that tract when the execution was levied, is not founded in fact. But it is contended by the defendant that this land being sold by the sheriff, and his sale confirmed by the executors, their heirs are now estopped to claim it. But I am of opinion that this would be to give a forced interpretation to their endorsement on the deed. For from the very terms of it, they profess to act only in pursuance of the power given to them by the will of their father, viz. to sell and dispose of *his* lands for the payment of *his*

debts. And it seems an unlikely circunstance that they should intend to confirm the sale of a tract of land belonging to themselves, for the same purpose, when it was not derived by descent from the father. It is possible that in a sale of so many tracts, not less than eight or nine, comprehended in the same deed, they might not have distinguished this one, which certainly the sheriff had no right to sell. Nor do I think that the cases relied upon prove that the plaintiffs are estopped to claim. They proceed on tho common principle that a tenant shall not deny the title of his landlord. But the question here is, whether persons acting in the character of executors, and with an express reference to the power conferred by the will, shall convey lands not belonging to the testator? I think the deed is not so to be understood, for Lord Coke says that every estopel must be certain to every intent, and not taken by argument or inference;—that it ought to have a precise affirmation of that which maketh the estoppel. 1 Co. Lit. 352. b.

Judgment for the plaintiff.

Note.—Upon the question of estoppel see *Millison* v *Nicholson*. Conf. Rep. 499. *Yarborough* v *Harris*, 3 Dev. Rep. 40. *Barnett* v *Roberts*, 4 Dev. Rep. 81.

LITTLEJOHN *vs.* UNDERHILL'S EX'R—Page 574.

Judgments obtained against an executor, after service of a writ and before plea, make him responsible for the assets he had when served with the writ, although such judgments are entered up *quando*; the executor having sold the property of his testator under the act of Assembly, between the time of the service of the writ and the judgments *quando*.

Such judgments may be pleaded, although given by a magistrate for a sum exceeding thirty pounds, provided the warrants do not exceed that sum. The charge of keeping an old and infirm slave is a charge in favour of the community upon the estate of a testator in the lands of his executor under the act of 1798, (1 Rev. Stat. ch. 89, sec. 20) and is to be paid in preference to the claims of any individual.

This is an action of debt upon an obligation given by the testator in his lifetime. The defendant pleaded "payment and sett off, prior judgments, judgments confessed, no assets, no assets ultra, retainer, plene administravit in all its forms;" on which pleas issue was joined. The jury now find a verdict for the plaintiff, on all the issues, subject to the opinion of the court on the following case.

The plaintiff's writ was executed on the defendant on the 2d January, 1815, returnable to Chowan County Court on the second Monday of March ensuing. The defendant sold all the property of his testator on the 17th January, 1815, at six months credit. At March term, to wit, on the 17th of March, 1815, the defendant entered the foregoing pleas. The defendant, on the trial, introduced satisfactory evidence under the plea of "retainer," and for the payment of the funeral charges and his own commissions, with the disbursement of all the assets with which he was charged, except the sum of $70. 60; and as to that sum he offered the following evidence. First, as to $100 of it—that among his testor's negroes was one by the name of Sarah, so old and infirm as to be incapable of labour; and that he had set her up to be provided for during the remainder of her life, to the lowest bidder; that the sum of $100 was the lowest bid; and that accordingly he had paid that sum for this purpose. And as

to $604 60 he offered in evidence a number of judgments on warrants brought on specialties before a justice, which were taken between the 21st of January and the 17th of March, 1815, and were paid by him previous to the issues being joined in the suit, and which judgments were of the following tenor to wit, "judgment in favour of the plaintiff for the sum of . Thomas Brownrigg the executor present, pleads "plene administravit in all its forms, no assets, judgments, bonds, notes, retainer, and no assets ultra, suits on bonds and notes." The pleas are admitted, and signed by the justice.

In some of these warrants the magistrate had given judgment for thirty pounds, the amount of the specialty, together with interest according to specialty previously accrued thereon; and the whole judgment thus exceeding thirty pounds. The amount of the excess of interest, which upon the warrants collectively, is $28 40, has been paid by the executor. It is submitted to the court to determine if the preceding questions are decided in favour of the defendant, whether these judgments should be allowed the defendant, as proper vouchers for the whole amount, or for any part? And its agreed, upon this statement of the case, to be submitted to the court to decide whether the defendant was justified in paying the above mentioned sum of money for such purposes, in preference to the plaintiff's demand. And judgment is to be entered up according to the opinion of the court, for such sum as they shall direct.

Browne for the plaintiff.

The plaintiff's writ was executed January 2d, 1815. All the estate was sold January 17th, 1815.

All the estate being in his hands when the writ was executed was *assets* to satisfy the plaintiff's claim. 1 Law. Rep. 99. Ib. March, 1715, 120.

Unless he can show that he *retains* it for the purpose of satisfying a prior claim of a third person, or an equal one of his own; or that, before pleading, he *paid* on compulsion, or voluntarily before notice. I Off. Ex. 145.

The utmost that has ever been allowed, is for the administrator to *confess* assets to an equal claim, and then plead that confession. Doug. [452]. *Waters* v *Miel's Administrators.*

These assets had not been confessed to the judgments offered in evidence, nor had they any lien on these assets; for they were, *quando acciderent.*

The act of 1803, c. 1, gives to justices of the peace jurisdiction of "all demands of thirty pounds and under, for a balance due on any specialty contract," &c.

Here, it *appears*, that some of the judgments were given in cases where there was *above* thirty pounds due on the specialty; which was assuming a jurisdiction not given by the act of Assembly, and the judgment was absolutely void, and of no more force than if given by any other individual. Com. Dig. Courts P. 15.

Therefore, being no judgment, the payment cannot be justified as the payment of a judgment; and as the payment of a specialty it cannot be justified; for the bringing of our suit had so attached the assets as to prevent the defendant from disposing of them unless by confessing them to a suit. 1 Off. Ex. 145. Doug. [452]. *Waters* v *Miel's Admin.*

As to the $100. If it is said that he was bound to support the negro, I answer that he was bound *as administrator.* And as administrator, he was bound to pay our debt. To pay simple *contract debts;* but that would be no answer to a specialty creditor, who had given notice. To pay legacies; but that would not defeat a creditor who had paid in time. To pay the rent of leased premises; but if he had no assets and did not enter, he would be excused.

Besides, the duty of maintenance was only to become due from time to time. And even among equal claims the administrator is bound to pay that which is due, in preference.—1 Off. Ex'or. 143.

The rent due at testator's death is a debt. That which becomes due afterwards is not. Ib. 146, 7.

Nash for the defendant.

There can be no difference between one judgment absolute, and one renderred *quando*, with respect to the question now before the court. For if we were not protected by the letter, we must pay both plaintiffs without having assets to do so, and without mispleading. We do not set up a voluntary payment against the plaintiff's writ, but judgments which we had no power to resist. As to the judgments, the magistrate had jurisdiction. The warrants show this. And even if the judgments might be reversed for error, they are nevertheless a bar as long as they remain in force. The true inquiry is, not whether judgments so obtained are erroneous, but whether they are fraudulent,—and of this there is no suggestion. 1 Stra. 410.

With respect to the support of the negro, we think it sanctioned by the act of 1798, c. 13.

Per Curiam.

The principal question in this case depends upon, whether the judgments obtained after the service of the writ and *before* plea, be of such a nature, as hold the executor responsible for the assets he had when served with the writ? and if these judgments had been, that the plaintiff *then have* execution, and *not quando*, it seems admitted they would, provided they are not void in law. As to the *nature* of the judgments, according to the *circumstances* of this case, we think that can make no difference; because it was true, when they were rendered, that the effects previously sold on the six months' credit, were not assets;—the act of Assembly having only made the executor accountable for them, in a reasonable time after the proceeds were due. Whenever, therefore, they *should* come, or *might* be obtained, they then would be assets, and the executor accountable to the judgment creditors for them. If, therefore, he was accountable to them, it is clear he ought not to be accountable to the plaintiff; for it has been properly admitted, that the priority of suit only ties the hands of the executor against a *voluntary* payment.

Then, as to the exception which has been taken to the judgments because they exceed thirty pounds. And we

think, as the warrants did not exceed thirty pounds, that the justice, therefore, had *jurisdiction*, and his judgment therefore, was not *void*, but only *voidable*.

The only remaining question is as to the $100 paid for the support of the disabled slave? and that we think must depend upon the nature of the transaction. If with a fraudulent design, upon being so *found*, would be unavailing. But if fair and honest, that it is good. For we consider this as a kind of *charge* upon the estate in favour of the *community*, which in case of a deficiency of assets, is entitled to a preference against the claims of *individuals*.—Wherefore, we are all of opinion there should be judgment for the defendant.

NOTE—Upon the first point, see *Gregory* v *Hooker*, 2 Murph. Rep. 250. S. C. upon another trial, 2 Car. Law Repos. 116.

COLLINS *vs.* UNDERHILL'S EX'R.—Page 579.

Judgments confessed by an executor or administrator is not a good plea for him.

This is an action of the same nature as the foregoing. The writ was executed at the same time, returned to the same court, the pleas the same as in that case and entered at the same time; but that case stood first on the docket. And now at this term, after the trial of that case and judgment for the plaintiff, the defendant moved for leave to plead that judgment as a plea since the last continuance, in discharge of the assets *pro tanto* in this case. And it is agreed to be referred to the Supreme Court to decide whether this plea shall be admitted. And it is further agreed, that in other respects, this case shall be governed by the decision of the Supreme Court, in the foregoing case of *Littlejohn* v *Underhill's Executor*.

Browne, for the plaintiff.

I believe the plea of *plene administravit* will not be received when it delays the plaintiff.

A plea of judgments recovered since the plea will not be admitted. 2 Hayw. 155.

And if admitted, not good. Conf. Rep. 555.

By administering, the defendant got the advantage of retaining that which he hath lost by misconducting his business.

PER CURIAM.

The judgment cannot be pleaded in the manner proposed.

NOTE.—See *Charchill* v *Comron*, 1 Murph. Rep 39, and also, *Woolford* v *Simpson*, 2 Hay. Rep. 132, and the cases referred to in the note thereto.

WILLIAMS *vs.* COLLINS.—Page 580.

Where the defendant undertook in a letter to the plaintiff, that he would guarantee "any contract which A. should make with with him for a vessel and cargo, or any part thereof," and A. made a contract for the same but did not comply with it, *it was held* that the guaranty made by an andorser was a conditional one, but that here the undertaking was that A. should comply and not that he should be able to comply; and that the defendant became pledged to the same extent that A. was was bound, as soon as the planitiff parted with his property.

Assumpsit on the following letter written by the defendant, and addressed to the plaintiffs.

SIR,——The bearer hereof, Mr. Henry Fleury, informs me, that he is about bargaining with you for the purchase of a new vessel and a cargo for her, also for a quantity of Indian corn. In case you and he should agree, I will guarantee any contract he may enter into with you for the same or any part thereof, and am,

Sir, very respectfully,

Your obedient servant.

JOSIAH COLLINS.

Edenton, Nov. 2, 1803.

The material facts in the case were, that in consequence of the above letter, the contract was made, and the vessel and cargo delivered to Fleury, who was to pay for them in three several instalments; for which he executed three notes,—one payable 1st January 1805, one on the 15th June 1805, and one on the 15th June 1806. These notes being unpaid, Williams instituted suit against Fleury, on the 17th August 1807, returnable to September term of the same year. A verdict was found for the plaintiff at March term 1808, and an execution issued from that term which was returned at June term 'nothing to be found;' an *alias* issued which was returned at September in the same manner.

The writ in this suit issued on the 9th October 1808, returnable to November of the same year, at Martin Superior Court.

On the 15th January 1807, Fleury mortgaged to creditors in New York, property which was sold on the 19th December 1809, for £1283 7.

Fleury became entitled to property under the will of Vallett, which was found in December 1806, to the amount of £345. Fleury and Collins both lived in Edenton.

Henderson and *Nash* for the plaintiff.

The contract is, that the defendant will guarantee *any* contract which Fleury may enter into with the plaintiff. The defendant is therefore bound to the full extent that Fleury himself would have been. There is no analogy between a bill of exchange and a guaranty. In the latter, no notice is necessary. In *Peil* and *others* v *Tatlock*, three years had elapsed before any notice was given; yet the plaintiff recovered—1 Bos. & Pull. 419. In *Eddowes* v *Neil*, there was a lapse of nineteen years without notice. 4 Dallas 133. All the cases go to establish, that the guaranty, binds indefinitely; and that he who gives it is bound to take notice of the circumstances of the debtor, and to do the first act.—1 Binny 195. 8 East 243. 3 Cranch 490.

Browne, for the defendant.

Where a creditor has a right to look to two in suecession, he is obliged to use due diligence against the first. This

applies to all cases whatever, whether the liability has arisen from the endorsement of a bill of exchange, or from any other cause. With this difference, perhaps, that in the first case, the law merchant requires more vigilant diligence on account of the sudden changes of fortune to which mercantile men are liable.

The endorser of a note is only a warranty thereof, that the drawer will pay it, and if he does not, that the indorser will. 1 Wils. 48.

There is the same undertaking, or guaranty, on an unnegotiable instrument and due diligence, although perhaps not so strictly, is there also required.—2 Wils. 353.

The law is precisely the same with regard to a letter of guaranty. The writer only warrants the solvency of the person in whose favour he writes; and if a loss happens owing to the want of diligence of the person written to, he must bear it. 8 East 242. If the warrantee might have saved himself and did not, he can have no recourse on the warrantor. Justice and equity require, that the person benefitted by the transaction should be first applied to, to pay for that benefit. And wherever the law makes it the duty of a man to do any thing, it requires of him due diligence in doing it.

Fleury remained absent for two years after the first note became due; one year and seven months after the second; and seven months after the last became due, and the plaintiff took no step to recover the money from him until one year and two months after the last note had become due. Nor did he give the defendant any notice whatever, that the notes, or either of them, had not been paid. Surely, no one can pretend that the plaintiff used due diligence, or that the loss arising from Fleury's insolvency was not owing to his neglect.

Of the cases cited for the plaintiff, that of *Peil & als.* v *Tatlock*, admits the doctrine contended for on behalf of the defendant. But the court thought "there was no want of communication with the defendant." They further thought that no loss had been sustained, which could by any mean

have been avoided. The case in 4 Dallas 133, also admits the doctrine. But the Court thought that, considering the war, the situation of the parties, and the other circumstances of the case, due diligence had been used.

In the case cited from 1 Binney 195, the writer of the letter of guaranty promised to be *accountable with* the person in whose favour it was written. And the question now before the court was never raised in that case. What weight will be allowed to the decisions of a court where a cause can be discussed at great length and decided without even once glancing at the principal question arising from the facts, is not for me to say.

Nash, in reply, entered into a particular examination and analysis of the cases before cited for the plaintiff, for the purpose of showing that the law relative to bills of exchange was in no respect applicable to letters of guaranty. As to the case cited for the defendant from 1 Wils. it was on a promissory note endorsed; and of course, subject to the rules which govern bills of exchange. The case from 2 Wils. was where the drawer of the order had effects in the hands of the drawee, and a demand and notice were consequently indispensable. The plaintiff here was under no obligation to concern himself about Fleury's circumstances, who was not contracted with on his own credit, but on Collins's. The latter, therefore, should have observed the transactions of Fleury, and apprised the plaintiff of any probable loss. Not having done so, he must be supposed to have approved of the moderate forbearance exercised by the plaintiff. It is a part of the case, that Collins and Fleury resided in the same town; the plaintiff lived in Martin county.

Seawell, J delivered the opinion of a majority of the court:

The present action is brought for a breach of defendant's agreement, to which the defendant has pleaded, the 'general issue and act of limitation.' The agreement which the plaintiff exhibits is a letter written by the defendant to the plaintiff in which the defendant states, that he will guaran-

tee any contract which one Fleury may make with the plaintiff for a vessel and cargo, or any part thereof Fleury makes a contract for the vessel and cargo, payable in instalments, the last of which was within three years of the commencement of the present action. And the defence relied upon is, that Fleury was *able* to have complied with his own engagement if the plaintiff had used due diligence, but that he is now, and has been for some time, insolvent; and that the loss should be borne by the plaintiff, who might by proper vigilance have obtained payment from Fleury.

In the opinion of a majority of the court, the case is completely stripped of all difficulty by examining what was the nature and extent of the guaranty. It was not, as seems to be supported by the argument, that Fleury should be *able* to comply with any contract he might make; but that he *should* comply. The defendant, therefore, to all legal consequences, became pleged, *absolutely* to the same extent that Fleury was bound, as soon as the plaintiff parted with his property; for it is apparent, from the terms in which the letter is written, that it was the defendant who was principally relied on. And as to the failure of Fleury, that was an event which it was incumbent on the defendant to guard against; and it behoved *him*, to hasten the plaintiff, or make such other provisions for his own safety as Fleury's circumstances would afford. But as to the plaintiff, he had from the *beginning* provided against that, by requiring some other person to be bound to him, who should be able to make good the contract of Fleury, though Fleury himself might fail. That the extent of the defendant's liability, as to every consequence in law, was the same as if he had himself signed the obligations which Fleury executed to the plaintiff; and that if his situation as a surety, or *warrantor* was to avail him any thing, *he* must himself entertain and *express* an anxiety that suit should be brought against Fleury, otherwise the plaintiff need not; for indeed the fact may be, that the plaintiff considered the defendant and Fleury equally interested in the purchase, as a joint concern. As to the act of limitation, that is out of the question. The plaintiff could

maintain but one action upon the agreement, and to have the full benefit of it, he must wait till the last failure of Fleury. Upon the whole, we think there is not the least analogy between this case and those which were cited for defendant.

The guaranty made by an endorser is a *conditional* one; this an absolute one. The guaranty that the purchaser of cotton should be indemnified upon a resale, can only be understood to mean an engagement that the price of the article shall be such, that if the purchaser *chooses*, he may have an opportunity of saving himself. The engagement in the present case to be analogous to those, must be, that defendant guaranteed Fleury should be *able* to comply with his engagement. He has however thought proper to warrant that he *should* comply, and, consequently, as Fleury has failed, the defendant is bound to perform his own; and therefore there must be judgment for the plaintiff.

Taylor, C. J. I formerly considered this case upon the whole statement, and made up an opinion when it was usual for the court to pronounce upon the record as sent up, without distinguishing, as we now do, between questions of law and those cases which contain only evidence or facts exclusively belonging to a jury. From the view I have taken of the case, it does not appear to me within our jurisdiction; as it presents only the question, whether the debt has been lost by the want of diligence in the plaintiff; and though this is sometimes called in the books a mixed question of law and fact, and more frequently a question of law, yet I believe that the practice of this State has, with much uniformity, treated it as a question of fact to be decided by the jury. My brothers think that the character of this contract excludes the question, and that the defendant is bound to make good Fleury's engagement, to the same extent as if he had signed the notes himself. I am of opinion that there is a distinction founded in justice and recognized by law, between an original detor and a surety or guarantee; and that whenever a contract is shown in court, which upon the face

of it, exhibits the defendant in the character of a surety, certain principles immediately apply to it; one of which imposes on the creditor the duty of showing that nothing has been done on his part tending to exonerate the principal and burthen the security.

Upon a joint and several bond, although one of the parties may in truth be a surety, yet in a court of law both are principals, because there is no way of getting at the transaction. But take the same case into a court of equity, and a difference will be made between the principal and surety; for if it can be shown that any act has been done by the obligee that may injure the surety, the court will lay hold of it in favor of the surety.—4 Vesey, jr. 824. 2 Bro. Ch. Ca. 578. 2 Vesey, jr. 540.

In the case before us, the true nature of the relation between the defendant and the plaintiff is shown by the letter; and if upon the question being submitted to a jury, they should be of opinion that the plaintiff might have recovered his debt from him who was benefitted by the contract, and that the loss was occasioned by the plaintiff's want of diligence, I should think he ought to bear it. For, to use the language of Lord Loughborough, in a case depending on the same principles, "it is a breach of the obligation in conscience and honesty, and it is not too much to say of that objection in point of law."—*Nesbit* v *Smith*, 2 Bro. Ch. Ca. 578. By a guaranty I understand a contract of indemnity which binds the party who gives it, only in default in him for whose benefit it is given. And from the nature of such a contract it results, that the debtor must be resorted to in the first instance.

In respect to the degree of diligence, that must depend on the circumstances of each case; and though I am not disposed to think that the strict rules relative to bills of exchange are applicable to this case, yet I am persuaded that the justice on which such rules are founded ought to have a correspondent effect wherever a man is sued for a debt for which he was not originally liable. The plaintiff in this case has considered the contract in the same light; for he

has received part payment from Fleury, and prosecuted a suit for the residue.

NOTE.—The decision here overrules the same case when before the court on a former occasion, 2 Murph. Rep. 47. Upon the subject of guaranty and the diligence required on the part of the guarantee to charge the guarantor—see *Towns* v *Farrar*, 2 Hawks Rep. 163. *Battle* v *Little*, 1 Dev. Rep. 381. *Shewell* v *Knox*, Ibid 404. *Grice* v *Ricks*, 3 Dev Rep. 62. *Smith* v *Morgan*, Ibid 511. *Eason* v *Dixon*, 2 Dev. & Bat. Rep. 78.

BLOUNT *vs.* BLOUNT—Page 587.

A deed cannot operate as a bargain and sale, unless it has a pecuniary consideration; nor as a covenant to stand seized to uses, unless the consideration be love and affection for a near relation, or marriage. Affection for an illegitimate child is not a sufficient consideration.

This is an action of trespass *quare clausum fregit*, in which the jury found a verdict for the plaintiff subject to the opinion of the court on the following point, to wit, whether a deed regularly executed, proved, and registered from Levi Blount, under whom the plaintiffs claim as heirs at law,—(which deed expresses that "the said Levi Blount, as well for and in consideration of the natural love and affection which he hath for and beareth unto the said Judith Whidbie, his natural born daughter, as also for the better maintenance and preferment of the said Judith Whidbie, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said Judith Whidbie, her heirs and assigns forever, the land in dispute,")—is sufficient to convey the said Blount's title to the said Judith Whidbie, under whom the defendant claims.

Hogg, for the plaintiff, cited 3 Cruise title deed. C. Lit. 123. a. Comyn's Dig. title Covenant. c. 5.

TAYLOR, C. J. delivered the opinion of the court.

The question arising upon this record is, whether the

deed relied upon by the defendant, is sufficient in law to convey the title from Levi Blount? The distinction between a deed and a parol contract is well settled at common law, and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men, would often betray them into acts of imprudence, and not unfrequently, expose them to the artifices of fraud, were they not placed under the safeguard of that rule, which denies validity to a parol contract, unsupported by a consideration. On the other hand, the ceremonies which accompany a deed imply reflection and care; and serve to enable a man to avoid either surprise or imposition.

This rule was changed only when Chancery assumed a jurisdiction of uses, when they acted upon the maxim of the civil law, *ex nudo pecto non oritur actio*, and would not carry a deed into execution which was not supported by a consideration.

Lord Bacon, in his reading on the statute of uses, remarks, "they say that a use is but a nimble and light thing and now contrawise, it seemeth to be weightier than any thing else, for you cannot weigh it up to raise it, neither by deed, nor by deed enrolled without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of Chancery, and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed or sufficiently passed by law; but if money have been paid and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

Of common law conveyances it is necessary to notice only a feoffment, and it is very clear that this deed canot operate as such. Because the case does not state that Levi Blount was in possession, nor that he gave livery of seisin; and if the deed were in all other respects formally in feoffment, the mere signing and sealing such a deed was, in no instance, sufficient to transfer an estate of freehold, unless the possession was delivered from the feoffor to the feoffee,

and without which a deed of foeffment only passed an estate at will.—1 Co. Lit. 43 a. The livery of seisin is the delivery of actual possession; and therefore cannot be made by a person who has not at the moment actual possession. Consequently, if a person make a feoffment of lands which are let at lease, he must obtain the assent of the lessee to the livery. The old practice was for the lessee to give up the possession for a moment to the lessor, in order to enable him to give the livery. Betterworth's case, 2 Rep. 31.

It is next to be enquired whether the deed can operate under the statute of uses, the effect of which is to impart efficacy to certain conveyances without a transmutation of possession.

A bargain and sale is a contract by which a person conveys his land to anothor for a pecuniary consideration; whence a use arises to the bargainee, and the statute immediately transfers the legal estate and possession to him without any entry or other act on his part.

For want of a pecuniary consideration then, it is perfectly clear that this deed cannot operate as a bargain and sale.

Nor can it operate as a covenant to stand seised to uses, because it is essential to this sort of coveyance, that the consideration be either affection to a near relation or marriage. The love and affection which a man is supposed to bear to his brothers and sisters, nephews and neices, and heirs at law, as well as the natural desire of preserving his name and family, all form good considerations.

There is an implied obligation subsisting between parent and children, who are considered in equity as creditors, claiming a debt arising from the duty a parent is under to provide for them.

But love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seised.

Where a person covenanted in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to A., his reputed son, (who was illegitimate) for life, &c. and also covenanted to levy a fine or make a

feoffment for further assurance. Afterwards he made a feoffment in fee to the covenantees, in performance of his covenant to the same uses. It was resolved that no use arose to A., the bastard, by the covenant, for want of a consideration. Nor could he take any thing by the feoffment, it being only made for further assurance.—Dyer 364, pl 16.

This case is expressly in point, and its authority is unquestionable; wherefore, there must be judgment for the plaintiff.

HILLIARD *vs.* MORE—Page 590.

Under the acts of 1784, the aunt of the whole blood on the side of the mother from whom the lands descended, shall take in exclusion of a brother of the half blood on the part of the father.

"Robert Hilliard departed this life intestate, some time prior to the year 1790, seised and possessed of a tract of land, lying in the county of Northampton, in fee simple. The said Robert left three daughters, his only children and heirs at law; to whom the aforesaid tract of land descended. The land was divided; and the part which fell to Martha is the land in dispute.

"The lessors of the plaintiff are the other two children of Robert Hilliard the ancestor. Martha, one of the daughters, intermarried with Norfleet Harris, some time in the year 1790, and on the 25th December 1792, he by deed, conveyed the land in dispute to William Bridgers, under whom the defendant claims. Martha, the wife of Norfleet Harris, was no party to that deed. Norfleet Harris had issue by his wife Martha, a son, Robert Hilliard Harris, the only issue of that marriage. Martha, the wife of Norfleet Harris, died some time in the year 1793. Norfleet Harris married a second wife and had issue by her, Elizabeth and Richard, who are living. Then Robert H. Harris,

the son, died some time in the year 1799, under age, intestate, and without issue. Norfleet Harris, the father, died on the 22d October, 1807.

"The question submitted to the Supreme Court is, who, are the heirs at law of the deceased son, Robert H. Harris? Are his half brother and sister on the part of his father? Is the father? Or, are the plaintiffs, who are the aunts of the intestate son on the maternal side of the whole blood? If the latter, then judgment to be entered for the plaintiffs for the land in the declaration. If otherwise, then judgment for the defendant."

SEAWELL, J. delivered the opinion of the Court:

The question in this case is, whether the aunt of the whole blood, on the side of the mother, from whom the lands were derived by descent, shall take in exclusion of a brother of the half blood on the side of the father? And this will depend upon the effect of the acts of 1784.

We will however premise, that this is the first case that has ever occurred in which the action was decided solely upon this point. For in the case of *Sheppard* and *Reef* two of the judges who decided for the defendant founded their opinion upon a title which they supposed the half blood acquired from the common mother; two other judges were of opinion that the half blood could not take; and the remaining two were of opinion that the mother had title. A majority, therefore, being of opinion that the defendant had title, though they differed as to the mode by which he acquired it, the defendant was necessarily entitled to judgment. For we are free to declare, that had the decision of the cause been upon this point, the length of time which has elapsed, and the effect the decision might have produced upon landed titles, and the decision being of the highest Court known to our law, we should have felt ourselves bound by it, though at variance with our own opinion. But as that question still remains to be decided, and this case embraces it, we must perform our duty without any regard to what may have been the general understanding, or what particular inconvenience it may produce to individ-

uals. We will proceed now to an examination of the question.

Previous to the act of 1784, all the rules of the common law in relation to descents, were in full force in this State; and it is quite certain, that under those rules the half blood could in no case inherit. Whatever, therefore, the Legislature of this country have done in regulating descents of real estate, so far operates as a repeal of the common law; and from this view it will result, that the rules of the common law still continued in every particular but in those cases in which they have been altered. That the Legislature themselves considered it so, must be apparent from their noticing in the preamble of the act of October, 1784, that it was necessary to amend the third section of the preceding act in order to let in the brothers of the half blood; for what but the common law could keep them out? The first act of 1784 does, as was contended by the counsel for the half blood, profess to regulate descents of real estates; and if the act had gone no further than the 3d section without any proviso, there could have been no room for the present question; and it may be wondered, if they meant no more, why they should have superadded the subsequent clauses. The act then would have had the effect of placing the half blood upon the same footing as the whole blood. In other words, would have abolished the distinction. But it is a sound rule, and of very ancient date, that in construing acts of Parliament, the meaning of the Legislature, in a particular part of an act, is to be ascertained by all they have said upon the same subject; for it will rarely happen that the act as it finally passed, has undergone no alteration as to the *extent* of the design of the Legislature from the time it was introduced, and this reasoning therefore applies with peculiar force to the operation of a proviso.

To this 3rd section a proviso is added, that when an intestate shall have half blood on father's side, and half blood on mother's side, that the half blood on the side from which the land descended shall exclude the other. Now it might be asked, if the half blood brother of the line of the first pur-

chaser is permitted to exclude the brother who is not of that line; and this for no other reason than on the score of blood, can the brother of the whole blood be supposed not to do so? And yet this will result from the construction contended for.

In the 7th section of the same act, the Legislature declares, that in case of the death of a child, intestate and without issue, or brother or sister, a dying *with* either of which had already been provided for, the estate should vest in the parent from whom *derived*; and in case of a purchase, it should vest in the father; but if he should be dead, then in the mother and her heirs; and if the mother be dead, then the heirs of the father; and in *default* thereof, the heirs of the mother. And the Legislature in the same year made an alteration in this section, declaring, that by accident the descent may be altered and the paternal excluded, which in all other instances, is most favoured; from the proviso therefore of the 3rd section, from the 7th section of the same act, paying respect to the ancestor from whom the estate descended, and from the amendatory or explanatory act of October, 1784, stating that the paternal line in *all instances* is most favoured, and assigning that as the motive for making the amendment, it is clear that it was not the intention of the Legislature in all cases to put the half blood upon an equality with the whole blood; for though in the first section of the act of October, 1784, there are some general expressions that it was the intention of the Legislature to let in the half blood equally with the whole blood, yet from the preamble it is plain that they were only guarding against a critical construction of the 3rd section of the act of April, 1784, which possibly might only let in the sisters of the half blood; and the only effect of this clause is to make brothers of the half blood capable of inheriting as well as sisters of the half blood.

If then, this be the proper construction of this clause, we have abundant reason to believe that the Legislature had not *entirely* lost sight of the principles of the common law in looking for the heirs in that stock from whom the land had been derived. That they narrowed down the principle, it is true, and would not permit one stock to exclude another up-

on a feigned presumption ; for in cases of actual purchase, as as the lands had not been derived through any channel by inheritance, they have permitted the half blood to share equally with the whole blood provided they are of that line most *favored by law* ; for we see that in a case of actual purchase they do not lose sight of this princple, for they declare, that in case of a death without issue, brother or sister, that the paternal line shall be, as in *all other instances, most favoured* and exclude the maternal.

To us, therefore, it appears that the general terms of the 3d section of the first act, have been so cut down and controlled, as well by the proviso as by the 7th section and the amendatory act of October, 1784, and the first clause of that act having no other object than to place *brothers* of the half blood upon the footing of *sisters* of the half blood; that in a case of a person dying intestate, none can claim to inherit the lands which the intestate acquired by descent but those who are of the blood of the ancestor from whom derived, and that therefore there must be

Judgment for the plaintiff.

Daniel, J. was of counsel in this cause, and therefore gave no opinion, but expressed himself to be of the same opinion.

Note.—See acc. *Ballard* v *Hill*, post 602. But see *Ballard* v *Hill*, 3 Murph. Rep. 410. *Seville* v *Whedbee*, 1 Dev. Rep.160. The canons of inheritance have been altered since the act of 1784 by the act of 1808 which see in 1 Rev. Stat. ch. 38.

HENRY'S EX'R *vs.* BALLARD AND SLADE—Page 595.

Though a paper writing be called a deed in the body of it, and the party was advised to make a deed, yet if the structure and operation of the writing shew it to be testamentary, made with a view to the disposition of a man's estate upon his death, it will enure as a will.

The jury find that Perry Fulsher, seised of the premises in fee, on the 2d of April, 1796, executed the instrument of writing (a copy of which is annexed to this case); that at the time the said instrument was about to be written, the said Fulsher asked, whether it was better to make a *will* or deed? and upon being told "a deed," directed the paper referred to, to be written, and accordingly executed the same. The jury further find, that Reading Squires *paid no* consideration to Fulsher, nor was he related to him by blood, otherwise than being the illegitimate son of Fulsher's wife; that Squires conveyed the lands mentioned in the said paper writing referred to, to the plaintiff, and that defendants entered upon the plaintiff's possession; and if the law from these facts be for the plaintiff, they find for him and assess his damages to six pence; if otherwise, for the defendant.

In the progress of this cause, it was first objected to the admissibility of the probate of the paper referred to, as a will, upon the ground that the certificate did not state that it was proven to have been attested by two witnesses in presence of testator. The evidence was received without prejudice to the exception. The defendant then offered the two living subscribing witnesses to prove the circumstances which attended the execution of the paper writing, as are found in the special verdict of the jury. This evidence was objected to, but admitted without prejudice to the plaintiff. The other witness who proved it as a will was dead. The special verdict, together with the several exceptions to the evidence, are transmitted to the Supreme Court for their determination. The paper writing referred to, together with the certificate of probate, is also made part of the case.

North Carolina, Beaufort County.

Know ye all men by these presents to whom it shall come greeting, I, the said Peregrine Fulsher of the said county and province aforesaid, being weak in body and health, do ordain this to be my last deed of gift. In the first place, I want all my just debts to be paid, and funeral charges, and to be buried in a Christian-like manner. In the first place, I give to my son-in-law, Reading Squires, 350 acres of land, to him and his lawful begotten heirs of his body, after the decease of me and my wife Tamar Fulsher. In the next place, I do give to my son-in-law, Reading Squires, all the property I own and shall own during my natural life, clear of all wills, legacies, or any thing that shall come against the said Peregrine Fulsher's estate, or any incumbrances whatsoever.

Given under my hand and seal, this 2d day of April, in the year of our Lord, 1796.

his
PEREGRINE ⋈ FULSHER, (L. S.)
mark.

Test of us,
his
William ⋈ *Riggs*,
mark.
her
Susannah ⋈ *Riggs*,
mark.
Samuel Harrison.

State of North Carolina, Craven County.
Court of Pleas and Quarter Sessions,
September Term, A. D. 1811.

The last will and testament of Peregrine Flusher was produced, and the execution thereof by the testator was proved in open court, and in due form of law, by the oath of Samuel Harrison, one of the subscribing witnesses thereto, who swore that he saw the said Peregrine sign and seal, and heard the said testator declare said instrument to be and con-

tain his true and only last will and testament; and the said Samuel Harrison further swore, that at the time thereof the said testator was of a sound and disposing mind and memory. Whereupon, ordered, that said will be recorded.

Badger, for the defendant, argued that the paper writing exhibited could only operate as a deed, which was the instrument intended to be made. Pow. on Dev. 13. Cruise Devise, c. 5 § 26. 2dly, That if it operated as a will, the certificate of probate was not admissible evidence, because it does not state that it was signed by two witnesses in the testator's presence. Acts 1784, c. 22, § 11.

It is not sufficient that the certificate states that the will was found in due form of law; for that is to be judged of by the court when a title is set up under it. A probate being *ex parte* is not conclusive. 4 Johns. 162.

Gaston, for the plaintiff, cited the act of 1784, ses. 2, c. 10 § 6, which makes the probates sufficient testimony for the devise of real estates.

Per Curiam.

It is not necessary to decide in this case upon the nature and effect of a probate when offered in evidence, because the judge who tried the cause informs us that in point of fact the witness introduced by the defendant did prove the execution of the will in the manner required by law; and in this respect we consider the statement as amended by the judge. On the other question, we are of opinion that this instrument of writing was made with a view to the disposition of the estate after the death of Fulsher, and although it is called a deed in the body of it, and the testator was advised to make a deed, yet the whole structure and operation of it shows it to be a testamentary paper.

Judgment for the plaintiff.

Note.—See *Thompson* v *McDonald*, 2 Dev. & Bat. Eq. Rep. 470.

NORWOOD *vs.* BRANCH AND OTHERS—Page 598.

Where a testator died leaving one tract of land undisposed of, and leaving a daughter to whom he had given no land, but a full share of his personal estate, the other sons and daughters, or their children if any of them have died leaving children, if they claim a share of the land, so undisposed of must bring into hotchpot all the land settled upon them by the testator, either by deed or *devise*.

John Branch, being seised and possessed of a large real and personal estate, devised the same amongst his children, with the exception of his daughter Patience, as to the real estate, but to whom he bequeated more than a full proportion of his personal property. Upon several of his children also he had made settlements in his lifetime of lands to a considerable value, but none upon his daughter Patience. John Branch died without making any disposition of a certain tract of land of 789 acres. Several of his children, to whom he had devised and given land died, leaving children; all of whom were parties to this petition, the object of which was to compel the children of John Branch and his grandchildren, whose fathers had been advanced, to bring into hotchpot the lands respectively settled, provided they claimed a share with Patience of the tract of land of which John Branch died intestate.

The case was argued by *Norwood*, for the plaintiff, and *Browne*, for the defendant.

Taylor, C. J. delivered the opinion of the court:

This case depends entirely upon the just construction of the act of 1784, regulating descents, and the act of 1795, admitting females to the inheritance; the great object of which laws is to make the estates of the children entitled to the inheritance, as nearly equal as possible. It is to descend to all the children, share and share alike, except such sons or daughters as have had lands settled on them by their deceased parents, equal to the share descending to the other chil-

dren. If the share so settled, be not equal to the part descending, it is to be made so out of that. The term employed by the law is, "settle," and this applies as significantly to a devise as to a deed. The opposite construction drawn from the English statute of distribution, has been in consequence of the peculiar wording of the act, which has the word "lifetime," and has been thought to signify such a provision as is made in the intestate's lifetime, and not by will —2 P. Wm. 441, though the decisions have not been uniform in this. 9 Vesey, 413. We are therefore of opinion, that the children of John Branch, upon whom lands have been settled by him, either by deed or devise, and his grand-children upon whose parents similar settlements have been made, must bring into hotchpot all such lands, provided they claim to share with Patience or the petitioner who purchased from her in the tract of land of which John Branch died intestate.

NOTE.—See 1 Rev. Stat. ch. 38, Rule 2. See also *Brown* v *Brown*, 2 Iredell's Eq. Rep. 309, where the propriety of this decision is doubted.

WILLIAMS *vs.* BAKER—Page 599.

An infant under the age of twenty-one years cannot dispose of his personal estate by will.

The special verdict in this case found that the testator, Robert Bignall, duly made his last will and testament on the 13th July, 1809, and that at the time of his so doing, he was upwards of seventeen years old, but not of the age of eighteen; but was of sound discretion. The question reserved is, whether he was of sufficient age to make a will of personal property?

In support of the will, *A. Henderson* and *R. H. Jones* argued at length, and cited may authorities; amongst which were, Swinb. 115. Sheph. Touch. 433. Cooper's Justinian

493. Hale's Hist. C. L. 23, 26. 1 Reeve's Hist. E. L. 54. Preced. in Ch. 316. 1 Bl. 80. 2 Bl. 497. 1 Vern. 255.

Baker, in opposition to the will, cited 3 Bac. 118, A. Dr. and Student 95. Infants' Lawyer 44. C. Lit. 89, b. 2 Vent. 367. Sheph. Abr. 130. Swinb. 75. Telv. 92. 2 Fonbl. 325. Rud. of L. & E. 317. 1 Tucker's Blac. 62.

CAMERON, J. delivered the opinion of a majority of the Court.*

The only question, raised on the special verdict found in this case is, whether a person under the age of eighteen years, can dispose of his personal estate by will.

The common law has wisely fixed on the age of twenty-one, as the earliest period, when the human mind has attained sufficient maturity to act with discretion. The rules established in the ecclesiastical courts in England, which allow infants to dispose of their personal estate by will, have never been in force and use in this State. If they had, we should feel ourselves bound by them, notwithstanding their repugnancy to common sense, and the common law. We cannot subscribe to the doctrine that a person may have a legal capacity to dispose of property by will, and yet be under a legal incapacity to dispose of the same property by deed.

TAYLOR, C. J. The consideration of this cause has not enabled me to concur in the opinion which has been delivered. But as the Legislature has, by a recent act, provided for all future cases, I shall content myself with stating, in few words, the grounds of my dissent.

That the testamentary age, when this will was made, commenced at fourteen in males and twelve in females, is, I think proved by the act of 1715, which validates all probates made before that time, and places them on the same footing with probates made before an *ordinary* or *ecclesiastical* Judge or person; and by the act of 1789, c. 23, which transfers the power to the County Courts. The Legislature must have been aware of the age at which persons were considered as capable of making testaments, in the Ecclesiastical Courts; and where jurisdiction over a subject is trans-

*Seawell J. gave no opinion.

ferred from one Court to another, without limitation, it must be understood that the court to which it is transferred, is to proceed according to the rules and principles adopted in the court from whose cognizance the subject is taken.

The age of making a testament was originally derived from the civil law ; but so are the rules which relate to representation in dividing an intestate's estate ; and the evidence of the adoption of both by the common law is equally satisfactory to my mind. Shepherd's Touchstone, written by an eminent common lawyer, Justice Doddrige, states the testamentary ages at twelve and fourteen ; Hargrave, in his Notes on Co. Littleton, is to the same effect ; together with many other writers. In Mosely's Rep. 5, the same rule is admitted in the court of Equity. That the common law knows no rule different from this, is evident from their refusing to issue a prohibition to the Ecclesiastical Court before which a testament was proved, made by an infant under twenty-one—2 Mod. 315. The common law itselt has established the same ages for certain things, as in choosing a guardian, and the capacity of committing crimes. I cannot but think it probable, that this rule has been acted upon in this State, and as it is to be found in all those books which the Legislature has directed the County Courts to be furnished with, it has been considered a matter of course and never drawn into question.

Note.—By an act passed in 1811 (1 Rev. Stat. ch. 122, sec. 14) no person under eighteen years of age shall dispose of his chattels by will, so that since that time infants of eighteen years of age and upwards may dispose of their personal estate by will though they may be under twenty one years of age.

BALLARD AND WIFE *vs.* HILL--Page 602

SEAWELL, J. This case presents the claim of half blood on the mothers's side, to lands derived by the intestate from the father, and depends upon the same question which was decided at this term in the case of *Hilliard* v *Moore.* The demurrer must therefore be sustained and the bill dismissed.

NOTE.—See *Hilliard* v *Moore*, ante 590, and the cases there referred to in the note.

WISTAR *vs.* TATE—Page 602.

When a note was endorsed as follows: "pay the contents to W. or his order, for value received, with recourse to me at any time thereafter, without further notice," *it was held* that a cause of action accrued against the endorser, without notice, from the return of an executiou against the drawer, by which nothing was made; but the terms of the endorsement did not render the endorser liable at any indefinite period of time.

Assumpsit against the defendant as indorser of a promissory note, made payable to him by Kittera and Musser, dated 25th August 1795, and payable a twelvemonth after date. The endorsement was in the following words, "pay the contents to W. Wistar, or his order, for value received, with recourse to me at any time hereafter, without further notice."

The makers of the note were insolvent in 1797; but separate suits were brought against them in 1799, in which judgments were confessed; but nothing was made by the execution, which was returned in 1800. A demand was made on the defendant in 1815; after which this suit was

brought. The pleas were 'general issue' and 'statute of limitations.'

Henderson, for the plaintiff. *Browne*, for the defendant.

For the plaintiff it was urged, that the terms of the endorsement gave the plaintiff a right to call upon the defendant, whenever thereafter he thought proper, without limitation as to time, or restriction as to the person's performance of any act on his part. In an ordinary endorsement the plaintiff must have made a prompt demand upon the drawer, and in case of failure, have given notice to the defendant; and after all this, must have brought his action within three years, if the defendant thought fit to plead the statute. But the doing of those things has been dispensed with by the defendant, who has also restrained himself from taking advantage of the statute. That in the most favourable construction for the defendant, the cause of action accrued only upon the demand; so that the suit being brought immediately after that, the statute has not attached.

For the defendant it was insisted, that the statute must be presumed to be pleaded the right way, either *non assumpsit tres infra annes* or *actio non accrevit*, as the case may require, or even both ways.

Where the action accrues by the promise, the plea is *non assumpsit infra*, &c. Where it accrues by some collateral matter, e. g. "if you will board such a one, I will pay you," it is *actio non*. Esp. 156 If it be, as has been urged, that the action could be brought at any time hereafter, next moment or 100 years, the plea would be *non assumpsit infra*, and is certainly a bar. What is it but a promise to pay on demand? If it was, that he might at any time hereafter have recourse, *provided he could not get the money from the obligor*, after using due diligence, the cause of action, if it accrued at all, accrued in 1798, as completely as when the writ was brought; and so the statute is a good bar still, but the plea is *actio non accrevit*. With respect to the maxim of *quisquis potest* &c. that signifies that the defendant is not obliged to plead them.—Gilb. L. E. 43. But if the statute is

pleaded, then the law says the suit shall not be maintained, and the parties saying it may, signifies not.

The court will not under any circumstances assume jurisdiction, where it has none—4 Vesey, jr. 790. 5 Ibid. 581. Nor can the agreement of parties oust the jurisdiction of the court. 1 Wills 129

CAMERON J. delivered the opinion of the court:

Although the endorsement of the notes to the plaintiff is couched in unusual terms, we cannot give to them the extraordinary latitude, which would subject the defendant to the payment of the demand after any lapse of time, as contended for the plaintiff. To place these cases on the most favourable grounds for the plaintiff, we must say, that the cause of action accrued against the defendant, from the return of the executions against the drawers of the notes. That was in 1800. No demand on defendant was made till January 1815, when the plaintiff's demand was most clearly barred by the statute for the limitation of actions.

Judgment for the defendant.

IRVING *vs* GLAZIER—Page 604.

Where a defendant's trunk containing money and apparel, was put on board the plaintiff's lighter, which was overset in a sudden flaw of wind, in consequence of not being provided with shifting boards, *it was held* that the defendant was not liable to contribute to the expense of raising the lighter, although by such means he obtained his trunk: for the claim could not be made on the ground of a general average, as that can arise only where a portion of the cargo is sacrificed for the safety of the rest, and that by the direct agency of man, by throwing overboard the cargo of the vessel in a moment of peril; nor on any other ground because the damage and consequent expense was occasioned by the neglect of the owner in not providing shifting boards which were necessary for the safety of the lighter.

The plaintiff declares, in an action of indibitatus assumpsit upon two counts, for money laid out and expended,

and for work and labour done. To which the defendant pleaded 'the general issue.'

The plaintiff was the owner of a sloop called the Farmer's Daughter. The sloop was employed by Moses Jones, owner of the schooner Newbern, then bound on a voyage from Newbern to New York, to carry from Newbern to Occacock Bar and there deliver to the schooner a part of her cargo, consisting principally of Indian corn, which the schooner was unable to carry over the shoal near Occacock Inlet called the Swash. The defendant was a passenger in the schooner, and as such entitled to carry his chest or trunk from Occacock to New York free of freight. The sloop received on board the lighter a load which he was hired to carry. It was not a full load for her, and she used no shifting boards. The defendant's trunk, intended to accompany him on the voyage to New York, was also, put on board the sloop or lighter to be carried down to the schooner; and for the freight of this to the Bar it does not appear whether there was or was not to be any charge. In this trunk, besides his apparel, the defendant had $545 in cash and bank notes. While the sloop was on her way down the river, a sudden flaw of wind careened her much on her side. The corn shifted over to leeward, and in consequence of this shifting of the cargo, she upsent and sunk. Had shifting boards been used, the misfortune would not have happened. Shifting boards is the name for a rough partition of plank made in the hold of a vessel to prevent a cargo from rolling or shifting over from windward to leeward side. They are well known to all persons concerned in navigation, and are almost universally used by vessels which go to sea with cargoes and corn. It has never been the practice for lighters to Occacock to use them, whether with a full cargo or only with part of a cargo. These generally carry a full cargo; and with a full cargo shifting boards are unnecessary.

The captain of the lighter, admitted to be a man of skill and experience, testified that he should have deemed it proper to put up shifting boards, and would have used them had he known when the lading commenced, that she was to take

less than a full cargo. It was testified that this case was the first accident of the kind known to have happened in the river. The plaintiff, after his lighter was thus sunk, at the expiration of , caused her to be raised; and by thus raising her enabled the defendandant, who was present during the process, to recover his trunk and its contents. The plaintiff, deeming this a case of general average or salvage, claims from the defendant a contribution to this expense proportioned to the rate, which the money and the bank notes of the defendant thus saved bear to the value of the lighter and cargo thus saved.

Taylor, C. J. delivered the opinion of the court.

This action cannot be supported on the ground of general average, because the rule of the maritime law upon which such claim is founded, renders it indispensable that the goods should be thrown overboard to lighten a ship, in which case the loss incurred for the benefit of all shall be made good by the contribution of all. It is not sufficient even that the goods are washed overboard by the agitation of the sea, or destroyed by tempest or lightning; they must be thrown overboard by the direct agency of man for the purpose of easing the vessel in a moment of peril, and thereby increasing the chance of her preservation, and that of the residue of the cargo.

The plaintiff claims from the defendant a proportionate part of the expense of raisng the vessel and cargo, but such claim it is impossible to fix on the principle of a general average, because all were involved in the same common calamity, and no portion was sacrificed for the safety of the rest. The cases where the expense incurred in relation to goods have become the subject of a general contribution bear no analogy to the present one. A ship may sustain damage in a storm which cannot be repaired without unlading the goods, and as all are interested that the voyage should be continued, the expense of such unlading should be borne by the owners of the goods. Yet if sails are blown away, or masts or cables broken, the owner alone must bear the loss. The defendant's goods in this case were not saved, nor was

the vessel raised with any view to prosecute the voyage: that was necesarily ended by the oversetting of the vessel and the consequent injury to the cargo. But the decisive ground on which this claim must be rejected, and which is also an answer to the claim for salvage is, that the damage and consequent expense proceeded from the neglect of the owner himself. It was his duty not only to have provided a sufficient vessel at the commencement of the voyage, furnished with whatever was necessary to convey her cargo in safety through an uncertain navigation, but to maintain her in a proper condition throughout the whole voyage.

The neglect of providing shifting boards where the cargo of grain was incomplete is not to be excused; the necessity of them is admitted by the captain, and is obvious to every person. It can scarcely be doubted, that if they had been provided, the vessel would not have overset by a sudden flaw of wind. It is certainly a matter of surprise that no accident of the kind has happened before, and can only be accounted for by supposing that a coutinual vigilance has been exercised to meet the approach of sudden flaws of wind, and by taking in sail before they strike the vessel. But the general neglect of ordinary precaution cannot excuse him who has thereby occasioned a loss to another's property; and no reason can be urged, why the shipper of goods or a passenger should be made liable, in any shape, towards the performance of a duty incumbent on the owner. This would be to place him in a more unfavorable situation even than an insurer on the vessel, who is not liable on the policy for the vessel, nor even for goods shipped in the vessel by a person no way interested in her, if she has any deficiency in any one article necessary for safe and secure navigation.

Note.—On the question of average, see *Ferguson* v *Fitt*, 1 Hay. Rep. 239.

GILCHRIST *vs.* MARROW—Page 607.

Where a person sold a slave "about eleven years of age, sound and healthy, and do by these presents further covenant and agree to warrant the right" &c., *it was held* to amount to a warranty of soundness.

This cause was tried before DANIEL, J. at Cumberland Superior Court. It was an action of covenant to recover damages for the breach of warranty of soundness contained in a bill of sale, whereby the defendant sold to the plaintiff "a girl slave, named Mary, about eleven years of age, *sound and healthy*, and do by these presents *further* covenant and agree to warrant the right and defend the title of the said slave," &c.

On the trial, it was contended that the warranty related only to the title, and not to the soundness; but the Judge being of a different opinion, a verdict was entered up for the plaintiff. The defendant moved for a new trial, which was overruled, and he appealed to this court.

M'Millan, for plaintiff, cited 6 Johns. 49. 10 Johns. 484.

Henry, for the defendant, cited Com. Dig. Covenant. A.

PER CURIAM.

It is contended by the defendant, that the only covenant contained in this bill of sale relates to the title; and that there is no other express covenant in the deed. We are clearly of opinion, that the following words in the deed contain an averment of a fact, and amount to an express covenant: "I have bargained, sold, and by these presents do bargain, sell, and deliver unto the said Archibald Gilchrist, one certain negro girl slave, named Mary, about eleven years of age, *sound and healthy*." These words are not as has been contended, barely words of description, but aver facts sufficient to maintain this action. The warranty of the title in the latter end of the bill of sale, does not destroy or interfere with the covenant upon which this action is predicat-

ed. The motion for a new trial must be overruled, and a judgment entered for the plaintiff.

Cramer v *Bradshaw*, 10 Johns. 484, is a case very much like the present.

NOTE.—See acc. *Ayres* v *Parks*, 3 Hawks 59—see also *Lanier* v *Auld*, 1 Murph. Rep. 138.

ALLEN AND WIFE *vs.* GENTRY—Page 609.

Where the wife, to whom her father had made a parol gift of slaves prior to the year 1806, was an infant when the act was passed in that year relative to such gifts, and married during her infancy, *it was held*, that the act did not bar a suit brought by her husband and herself more than three years after the passage of the act.

Detinue for a slave of which the defendant made a parol gift in 1801, to Sarah his daughter, one of the plaintiffs, who, in December, 1803, and when she was an infant, intermarried with Allen, the other plaintiff, who was of full age. The writ was sued out on the 12th September, 1814, and the defendant pleaded the act against parol gifts of slaves.

Norwood for the plaintiff:

This case is excepted by the infancy of the wife and the supervening coverture, and she would have three years after discoverture to bring the action. Since the cases of Johnson and wife and Harris and Norfleet, decided in this court, it is understood that the husband cannot sue without joining the wife.

SEAWELL, J delivered the opinion of the court.

This case depends upon the proviso of the act of 1806. The act requires all persons claiming slaves in virtue of any parol gift, to bring their actions within a limited time after the passing of the act. And the proviso alluded to, is of the saving to infants, femes covert, &c.

The wife, in this case, was an infant at the passing of the

act, and became covert during her infancy, and has continued so, to the bringing the present action; and seems therefore so completely within the savings, as to admit of no question.

But it has been alleged, that the husband who labored under no disability, *might* have brought an action in his own name, and ought therefore to be barred of the present. And a case decided in this court some years past, supporting this kind of action in the name of the husband alone, has been relied on. As to that case, it is only necessary to say that there are as authorities to support it, 2 Lev. 101. 3 Salk. 64. 3 Lev. 403, and Bull. Ni. Pri. 50; but that the present affirmative of the proposition by no means disposes of the question. For by that mode of reasoning, the object of the proviso would be totally defeated; because the husband *can* at all times use the wife's name, and so *may* any of the persons included in the savings bring and *support* their actions; but the Legislature, in tenderness to their situations, exempts their claims from the operation of the act, till their disabilities cease. That the husband and wife *may* join in all actions, which survive to the wife, can admit of no doubt. And, indeed, it seems now settled that, regularly, they *ought* to join in such cases.

We are *all* therefore of opinion that the present action is not barred, and that there should be judgment for the plaintiff.

Note.—By the act of 1806, (1 Rev. Stat. ch. 37, sec. 17,) all parol gifts of slaves thereafter made are void.

DYER *vs.* RICH—Page 610.

When a party swears that a judgment final by default was taken against him at the appearance term, which he was prevented from attending by a violent attack of sickness, that he applied at the next term to have the judgment set aside which was refused, and that he has merits, a *certiorari* will be granted him.

This cause was tried before DANIEL, J. at Sampson Superior Court, where the certiorari was dismissed; from which decision an appeal was taken to this court.

The affidavit made by Dyer, on which the certiorari was obtained, stated that he purchased from Rich, a certain slave for the price of $450; in payment of which he endorsed a note of Robeson's to Rich, for $650, the latter paying the excess by a note, and some produce. That after the sale of the slave, the parties entered into a contract in writing, but without seal, that Dyer should convey the slave out of the State, and dispose of him in two months; which he avers he performed. That afterwards Rich sued him upon the agreement to Sampson County Court at May Sessions 1815, which he was unable to attend through a violent attack of illness, and had no opportunity to employ an agent. That at the return term a judgment final by default was taken against him, and an execution issued. At the succeeding term he moved, upon the foregoing facts, to have the judgment and execution set aside, but was overruled.

The counter affidavit of Rich avers, that the agreement to carry the slave out of the State, was a part of the original bargain, and not made after it; and that if Dyer did remove the slave, it was done so evasively that a very short time afterwards he returned, and is now in Dyer's possession.

SEAWELL, J. delivered the opinion of the court:

We are all of opinion, that the certiorari should be sustained in this case.

It is stated by the applicant, that he never had an opportu-

nity of making any defence; and from the facts he has stated, if they be *true*, great injustice has been done him. The defendant, in the *certiorari*, does not deny that the trial was *ex parte*, but insists, that according to his belief, the applicant has no defence upon the merits. If, therefore, the petitioner is turned out of court, and he is injured, he is without remedy. But as to the other side, if he has good cause of action, he will still prevail, and his ultimate recovery be secured. Let the cause be placed on the trial docket and a trial be had *de novo*.

CLEMENTS *vs.* HUSSEY—Page 611.

When the defendant dies, and a *sci. fa.* against his administrator regularly issues from term to term, although not actually served until after the lapse of five terms, the suit will not be abated.

This is an action on the case in *tort*, to recover damages for the breach of a patent right. The defendant pleaded to the merits of the cause, and after the suit had been continued several terms, he died. A *scire facias* was served on David Mock, administrator of the property of the defendant, returnable to April term 1816; and he pleaded in abatement, that the defendant died on the 5th day of October, 1814, and that no process was served on him until the 1st day of April, 1816. To which plea the plaintiff replied, that at October term, 1814, the death of the defendant was suggested. He prayed a *scire facias*, against the representatives of the defendant, which was ordered, and that a *scire facias* was made out accordingly; that an *alias scire facias* was issued from April term, 1815, to October term, 1815, and was delivered to the sheriff of Rowan, the said administrator being a resident in that county, and that *pluries scire facias* was issued from October term, 1815, to April term, 1816, which was executed and duly returned, the defendant

demurred to the replication, and the plaintiff joined in demurrer.

CAMERON, J. delivered the opinion of the court:

The plaintiff has omitted nothing necessary to prevent the abatement of his action. Process having regularly issued from term to term, after the death of defendant intestate, till the administrator was made party, although not actually served, prevents the abatement which the defendant seeks.

The demurrer was *not* allowed.

NOTE.—See *Hamilton* v *Jones*, 1 Murph. Rep. 441.

GUBBS *vs.* ELLIS.—Page 612.

When the lessor of the plaintiff in ejectment enters on the premises, during the pendency of the suit, he becomes liable to pay the costs of the suit.

In this ejectment for plea since the last continuance, the defendant saith, that the lessor of the plaintiff, by his agent and attorney in fact, hath possessed himself of the premises in question and maintains the possession, &c.

To which the lessor of the plaintiff demurs generally. Joinder in demurrer. The question upon the demurrer is, at whose cost the suit shall be dismissed? Which is referred for decision to the Supreme Court.

PER CURIAM.

The costs must necessarily be paid by the plaintiff, whose entry on the premises has destroyed the effect of his writ.

NOTE.—See *Morgan vs. Cone*, 1 Dev. & Bat. Rep. 234.

HARPER *vs* GRAY AND OTHERS.—Page 613.

An application to set aside the probate of a will, on the ground of irregularity, must be made to the court where the will was finally tried, and not to the court where it was first offered for probate.

SEAWELL, J. delivered the opinion of the Court:

We think a statement of this case will free it from difficuty.

Park's will is exhibited in Randolph County Court for Probate, is carried from thence by way of appeal to the Superior Court: from that Court is removed for trial to Rowan county, where it is tried by a jury who find in favor of the will, and the same is directed to be recorded by the Clerk of that Court, and a *copy* directed to Randolph for record in that county. The petitioners charge that the *probate* was irregular, and petition Randolph County Court to set it aside, and order probate *de novo*. If the probate was irregular, application must be made to the Court which erred, or to one of *controlling* power. The Court of Randolph has committed no blunder which stands in the way, as by the *appeal* to the Superior Court, a new trial was produced. It has no control over Rowan Superior Court; and therefore if it should direct the probate to be set aside and award a rehearing, it would be vain and nugatory. We think, therefore, the petition must be dismissed.

NOTE.—See acc. *Hodges vs. Jasper*, 1 Dev. Rep. 459.

BAKER *vs.* EVANS.—Page 614.

Where a mortgajor is permitted to remain in possession of the land, and, after the mortgage is forfeited, sells to another who has no notice, and who, together with his aliences, continues in possession seven years claiming the land, that gives a title under the act of 1715—(1 Rev. Stat. ch. 65, sec. 1)

The plaintiff claims title to the premises in the declaration, by virtue of a mortgage deed, dated 17th November 1797, from Samuel Purviance to Isaac Burkloe, to secure the payment of £170, payable 1st December 1799.

The said Samuel was in possession of the mortgaged premises and sold the same to Lewis Johnston, the 5th July 1800, who entered into possession soon afterwards, and in two weeks after Purviance went out. Johnston sold to John Evans the devisor and husband of the defendant 18th of February 1804, who entered into possession in two or three days after Johnston went out, continued in possession, and died seised of the premises, and the defenant has continued in the actual possession ever since. There was no evidence that Johnston had notice of the mortgage before he purchased from Purviance, nor was a knowledge of the mortgage brought home to Evans before he purchased.

But it was proved that Johnston knew of the mortgage before he sold to Evans, and complained of the injury done him by Purviance; and it was proved that about the time Purviance was a candidate for Congress, it was universally spoken of to his disadvantage, that he sold land to Johnston which was mortgaged; and Johnston himself spoke of it as a dishonest act in him. It was also proved, that Evans lived a near neighbour to Johnston and was intimate with him, and the opinion of the witness was, that Evans must have heard that the land was mortgaged. The whole of these purchases were for a full and valuable consideration.

Philemon Hodges proved, that in 1803 or 1804, he was desirous to purchase the land, but had heard of the mort-

gage and went to Burkloe and asked him if he had a mortgage for it, who answered that he had, but that it was nearly paid up, and for him not to stop purchasing on that account, for that he should not be disturbed. He proved that Burkloe died in 1807 or 1808.

Jackson proved, that near about the time Johnston sold, he heard Burkloe say to him he had received satisfaction for the mortgage, and that he might sell, he should never be disturbed. The same witness swore that on the trial of this cause in the County Court, David Evans, (then a witness, but now dead) swore, that about one or two months before Evans, the devisor, his father, purchased the land from Johnston, Burkloe told him he had received satisfaction for the mortgage.

George Evans, another son of the devisor of the defendant, swore that Burkloe told him the day before his father purchased the land, that he had no mortgage for it, and he searched the Register's office for a mortgage, but could find none. The mortgage produced, was not registered until after the commencement of the suit.

The jury found a verdict for the defendant. And on motion for a new trial, the same is ordered to the Supreme Court, on the following questions.

1st. In a case like the present, is there such an adverse possession as upon which the statute will attach?

2d. The estate once forfeited and become absolute at law, is it a good defence in ejectment by the mortgagee to offer parol evidence of the payment of the mortgage under the act of Assembly, or such evidence as is here offered?

Henry, for the plaintiff, cited Powell on Mortg. 207, 219.

M'Millan, for the defendant, cited 3 Bla. 535. Powell Mortg. 54. Douglas 630.

PER CURIAM.

Samuel Purviance executed the mortgage deed to Burkloe, on the 17th November, 1797, to secure the payment of £170, payable 1st December, 1799. The mortgagor was permitted to remain in possession, and after the time the mortgage became forfeited, to wit, on the 5th July, 1800, he

conveyed the land to Lewis Johnston, who had no notice of the mortgage, and who entered into possession of the premises, and held them as his own property until the 18th February, 1804, when he sold the premises to John Evans, who entered as soon as Johnston went out of possession, and continued the possession as long as he lived, and the defendant his widow and devisee) has continued in possession ever since.

It appears from the case, that Lewis Johnston, John Evans, and the present defendant did, each in succession, hold the possession of the land, as their own, and adversely to all the world. It does not appear from the cause, when the action was commenced; but it is admitted that it was more than seven years after the entry of Johnston. We are of opinion, that the defendant and those under whom she claims, have been in the continued possession of the premises, under a colour of title for more than seven years, holding the lands adversely to all the world, and therefore the act of 1715 bars the lessor of the plaintiff in the present action. The opinion given by the court, upon the first point in the cause, renders it unnecessary to give any opinion on the second point.

The motion for a new trial in this cause is overruled.

STATE *vs.* COMMISSIONERS OF FAYETTEVILLE—Page 617.

An indictment will lie against the commissioners of the town of Fayetteville for culpable omission and negligence in not repairing the streets; because they are invested with the power to levy taxes, one object of which is to keep the streets in order.

Gaston, for the defendants, cited Grown. Circ. Comp. 307. 1 Hawk. 368. Acts 1786, c. 18, § 4. 1715, c. 36, 2, 1784, c. 14. 1786, c. 18. Private acts 205. 2 Hayw. 228. 1 Hayw. 243.

M'Millan, for the State, cited Private Acts, 1783, c. 25, § 7. Crown Cir. Comp. 548. Doug. 797. 2 Coke's Inst. 701.

DANIEL, J. delivered the opinion of the court:

It is referred to the Supreme Court to decide upon consideration, of the public law, and of the private acts which have been passed to regulate the town of Fayetteville (which private acts are a part of this case) whether the persons who hold the office of Commissioners are liable to an indictment upon the ground that the streets are out of repair.

We are of opinion, the defendants are subject to an indictment, if the streets of the town are permitted to be and remain out of repair. Annoyances in highways, by rendering the same inconvenient or dangerous to pass; either positively by actual obstructions, or negatively, by want of reparations, are deemed nuisances. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse the same, may be indicted.

Let us examine who are bound to repair and cleanse the streets of the town of Fayetteville. By an act of the General Assembly passed in the year 1787, the Commissioners are invested with full power and authority to make rules and regulations, and to pass ordinances, for levying and collecting taxes on the persons and property in said town; and they are directed and empowered to appropriate the money which they shall cause so to be collected to various objects for the good government and well-being of said town; one of which objects, as expressly declared by the act, is the reparation and keeping in good order the streets of said town. It is not denied, that the keeping the streets in repair is a thing that concerns the public in general. If the Commissioners are guilty of omission, in laying the taxes, and appropriating some part of the proceeds, in repairing the streets; I would ask if they have not completely omitted to perform an essential duty, imposed upon them by law, which duty was of public concern? The law says, that where a statute commands or prohibits a thing of public concern, the persons guilty of disobedience to the statute are liable to be indicted for the disobedience. The Commissioners, instead of calling out the

hands to work on the streets, like an overseer of the public roads, call forth the pecuniary resourses of the town, and hire labourers to perform the duty, &c. It has been said, that as the Commissionere are annually elected, it might so happen that one set of Commissioners might be punished, for the omission of their predecessors in laying the taxes, &c. The defendants are charged in the indictment with their own culpable omission and neglicence, and not with the faults of others; and unless this principal charge in the indictment, be sustantiated, they cannot be convicted. The law requires an impossibility of no man.

The demurrer is overruled.

LOWRIE, J. I doubt.

NOTE.—See *State* v *Justices of Lenoir*, 4 Hawks, 194. *State* v *Commissoners of Halifax*,, 4 Dev. Rep. 345.

McFARLAND *vs.* PATTERSON—Page 618.

When it is clearly proved, by evidence other than the party's own oath which is inadmissible for that purpose, that a writing is lost by time or accident, parol evidence of its contents is admissible, but not otherwise.

A plaintiff cannot abandon a count upon special agreement, and recover upon the common count, upon the ground that the evidence of the special agreement has been lost.

This cause was tried before DANIEL, J. at Robeson Superior Court. It was an action of assumpsit. There were two counts in the declaration. One on an agreement reduced to writing by the parties; the other for goods sold and delivered. The plaintiff failed to produce the agreement declared on, and moved to give parol evidence of its contents, offering to prove by his own oath that the agreement was lost. The court would not permit him to prove the loss by his oath. He then introduced two witnesses, who

deposed as follows, viz. John M'Farland stated, that the plaintiff had a small chest at his turnpike bridge where he kept many of his valuable papers, such as deeds, &c. That it had a lock on it. That the plaintiff had his, the witness's, bond for a sum of money, which he paid on a report of his the plaintiff's valuable papers having been lost, and has never seen the bond since. Sarah M'Farland said, that she lived at the plaintiff's turnpike-house; and some time after the commencement of the suit, one night after she had gone to bed, she was awaked by the noise of an old negro woman who was scolding at some body. She then got up and found the chest open. When she went to bed the chest was shut. It had a lock on it; but she does not know whether it was locked that night. She saw some papers in the chest afterwards.

The court permitted the plaintiff to give parol evidence to support the second count in his declaration, which was for the sale and delivery of a yoke of oxen, cart, and log-chain, and were the principal subjects of the agreement mentioned in the first count. The plaintiff obtained a verdict (after all the evidence of each party was given in) for fifteen dollars.

A new trial was moved for, becaase the court had permitted parol evidence to be given, without sufficient evidence of the loss of the written agreement, which was overruled and appeal taken to this court.

Per Curiam.

We are of opinion, that the loss of the written agreement was not sufficiently established to let in the plaintiff to prove the contents of it by *parol*. This case does not come within that class of cases which authorises a plaintiff to abandon his count predicated upon a special undertaking which has been reduced to writing, and recover on a *quantum valibat*, or any other general count which may be incorporated in his declaration. Those cases are, where the plaintiff has performed a part of the work or duty which he bound him-

self by his written agreement to perform, or when it is done not in pursuance of the agreement, and the defendant has had the benefit of the work or other thing thus imperfectly executed. In a case of that kind, it is very clear that the plaintiff could not recover on the special contract, because he would be unable to aver and prove performance;—and it would be the height of injustice to permit the defendant to derive a benefit from the plaintiff's labour or services, without an adequate compensation. Therefore, the law will, in such cases, permit him to abandon his special agreement and recover upon the other counts in his declaration.—10 Johns. 36.

The case now before the court, stands upon the long established rule, that parol evidence cannot be admitted to prove the contents of the written contract, unless it shall be clearly made appear that the written contract is lost by time or accident.

The plaintiff not having shown that the written contract was lost in either of the above ways, he should not have been permitted to prove the same by parol.

A new trial must be granted.

Note.---As to proof of lost papers other than deeds, see *Garland* v *Goodloe*, 2 Hay. Rep. 351. *Cotton* v *Beasley*, 2 Murph. Rep. 259. *Governor* v *Barkley*, 4 Hawks 20. *Dumas* v *Powell*, 3 Dev. Rep. 103. As to lost deeds, see *Blanton* v *Miller*, 1 Hay. Rep. 4. *Wright* v *Boyan*, Ibid 178. *Park* v *Cockran*, Ibid 410. *Nicholson* v *Hilliard*, 2 Murph. Rep. 270. *Smith* v *Wilson*, 1 Dev. & Bat. Rep. 40.

DEATON *vs.* GAINES—Page 620.

An equitable right in land is subject to execution and sale under the act of 1812 (1 Rev Stat. ch. 45, sec. 4, 5 & 6) and equity will not compel a *bona fide* purchaser to pay the balance of the judgment when the land sells for less, although the execution issues at the suit of the legal owner and the equitable owner is insolvent.

In Equity.

Joseph Deaton, being seised of a tract of land, agreed to sell it to one William Smith, who gave his bond to Deaton for the purchase money, and Deaton gave his bond to Smith to make him a deed for the land. No time was mentioned in the bond within which the deed was to be made.

When Smith's bond became due, Deaton brought suit on it and Smith brought suit against Deaton upon his bond to make title. Deaton recovered a judgment against Smith, and Smith was non-suited in his suit against Deaton.

Soon after Smith sued Deaton, Deaton tendered him a deed for theland, which he refused to accept. Deaton placed this deed in the hands of his attorney in the suit, and returned to the Mississippi, where he resided.

An execution was sued out at the instance of Deaton on his judgment against Smith, and no personal property being found, the execution was levied upon Smith's equitable estate in the said tract of land, which was sold by the sheriff and purchased by James Gaines, for a sum much less than the judgment and costs. Gaines, at the time of the purchase, had full notice of all the preceding facts, and of the further fact that Smith was insolvent, and had no property out of which the residue of Deaton's debt could be made. Some time after the sale of the land by the sheriff, and at the court at which Smith was nonsuited, Deaton's attorney handed to Gaines the deed aforesaid, but not by the direction of Deaton or with his knowledge.

It is submitted to the court, whether Gaines is bound

to pay the residue of the debt, or to surrender his purchase upon his receiving back the money he has paid with interest?

DANIEL J. delivered the opinion of the court:

Gaines was a *bona fide* purchaser under a regular judgment and execution, at a sheriff's sale. I would ask what principle of equity it is, which can compel Gaines to pay the balance of the judgment or surrender the lands, as the complainant proposes? I confess I know of none. The equitable estate of Smith in the land was subject to an execution, by virtue of the act of Assembly of 1812, c. 6. Gaines was the highest bidder. He is entitled to keep what he bought on paying his bid.

The bill should be dismissed with costs.

BYRD *vs.* CLARK.—Page 622.

No very strict certainty in the description of lands in a declaration in ejectment is necessary to warrant the writ of possession. Hence *it was held* that a description in the following terms was sufficient for that purpose; "one tract of land, containing 150 acres, lying and being in the county of Martin, and state aforesaid, in the low grounds of Roanoke, on the south side, it being part of 350 acres granted to J. M. the 7th Nov. 1730, beginning at a sycamore tree, supposed to be Colonel C. P's line, and so extending out and in, according to courses of patent aforementioned, to conclude and make out the above said 150 acres, with the appurtenances."

An action of ejectment in which the plaintiff obtained a verdict; and the question reserved was, whether the premises were sufficiently described in the declaration to authorise the issuing of a writ of possession. The description is as follows:—"One tract of land containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke River, on the south side; it being part of 350 acres, according to contents of patent granted to John M'Caskey the 7th November, 1730;

beginning at a sycamore tree supposed to be Colonel Cullen Pollock's line, and so extending out and in, according to courses of patent aforementioned, to conclude and make out the above said 150 acres, with the appurtenances."

Browne, for the plaintiff:

In ejectments, there is no great certainty required in the description of the premises; for the sheriff's assistance is required only for the purpose of preserving the peace.—2 *Cromp. Prac.* 212. He delivers possession on the showing of the plaintiff, who is at his peril, to take possession of no more than he is entitled to. And if he does take possession of more, the court will set the matter right in a summary way.—1 *Burr.* 623. 5 *Burr.* 2672.

The precedent in 2 Cromp. Prac. 162, is of four messuages, four barns, with the appurtenances, in the parish of St. Mary, Islington." In which parish there are probably more than 400 messuages, and as many barns; any four of which would answer the description.

In Lilly's Entries, 192, it is of "five messuages, twenty cottages, 400 acres of land, 200 acres of meadow, 400 acres of pasture, with the appurtenances, in Welhen-Slawston, Harborowe and Bowden Magna." And the other precedents in the same book, are not more accurate in their description.

The description in the case before the court, is of "one tract of land, containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke, on the south side, it being part of 350 acres granted to John McCaskey, the 7th of November, 1730, beginning at a sycamore tree, supposed to be Colonel Cullen Pollock's line. This, without laying any stress on the balance of the description, is more accurate and precise than that of any of the precedents in the books.

There never occurs a case of disputed boundary, where the court and jury can decide solely on the description in the grant or deed. They are obliged to have recourse to the testimony of witnesses. As the sheriff cannot do so, he has

recourse to the information of the plaintiff, who gives it to him at his peril.

PER CURIAM.

We are of opinion, that a writ of possession ought to issue, and that the description is sufficiently certain for that purpose.

NOTE.—See *Osborne* v *Woodson*, 1 Hay Rep. 24. *Godfrey* v *Cartwright*, 4 Dev. Rep. 487. *Huggins* v *Ketchum*, 4 Dev. &. Bat. Rep. 421.

SHEPHERD *vs.* MONROE AND OTHERS—Page 624.

A court of equity still retains its jurisdiction in cases of contribution of surety against another, notwithstanding the act of 1807 (1 Rev. Stat. ch. 113, sec. 2) gives a jurisdiction in such cases to the courts of law.

This bill was filed against the defendants Malcolm Monroe, Pleasant Wicker, and John M'Lennon; all of whom, with the complainant, were co-sureties for one Nathaniel Williams, to Thomas Stokes, since deceased, in a penal bond conditioned to pay £93 7 6, with interest.

Stokes afterwards recovered judgment and execution on the said bond against the said Nathaniel, the principal, and the complainant and the defendants, the sureties. The *fieri facias* was returnable to May Court, 1810, levied on Shepherd's property, and Shepherd paid the execution, viz. £107 1 1½. Williams, the principal, is insolvent.

The end of this bill is, to compel the defendants, who were co-sureties for Williams, with the complainant, to contribute their proportionable parts of the said debt and the costs and expenses thereby incurred and paid by the complainant.

The defendants have been duly served with process &c. and are all in contempt for want of answering, and the bill is taken *pro confesso*, absolutely, against all of them,

and the cause held for hearing *ex parte* at the next term. And now at this May Term, 1816, a motion is made by the counsel of Monroe to dismiss the bill for want of equity. To which the complainant's counsel objects,—1st, because it is not regular or proper to dismiss for such a cause, on motion, and it is too late even to demur and *a fortiori* to move to dismiss. 2dly, That there is equity in the bill, and the remedy lately given at law does not take away or oust the Chancery of its jurisdiction.

The questions therefore submitted, are, 1st, Can this bill under its circumstances be dismissed, on motion, at this time? 2dly, Is there equity to sustain the bill?

Daniel, J. delivered the opinion of the court.

Before the year 1807, it was thought a bill in equity was the only remedy a party could have, to obtain his right in a case like the present. In that year, the Legislature passed an act giving an action at law; but on examinining the act, we do not discover the Legislature intended to oust the Court of Chancery of its jurisdiction altogether; for there are no negative words in the act. We are, therefore, of opinion, that this Court has concurrent jurisdiction with a court of law. In England, courts of law have sustained actions, of late, by one security against the other, when the principal has become insolvent; and we find authorities which say, the Court of Chancery retains its jurisdiction in such cases notwithstanding. Coop. Plead. 142. 5 Vesey 792. 8 Vesey, 312.

The motion to dismiss the bill is overruled. It is unnecessary to decide the other point in the cause.

WRIGHT'S EX'RS *vs.* WRIGHT'S HEIRS—Page 625.

Where, on the trial of an issue of *devisavit vel non*, the will was attested by two witnesses, one of whom was absent from the State and whose credibility was impeached at the trial, so that the will was proved only by the other, whose testimony if credible, the court instructed the jury, was sufficient to establish the will, although the absent witness was proved incredible, the jury found against the will, and the court refused to grant a new trial.

This was an issue to try the validity of a paper writing, offered by the plaintiffs as the last will and testament of John Wright, deceased. It was witnessed by James Berry and Demsey Squires.

On the trial, it was proved, that James Berry, one of the attesting witnesses, had left the country some time before and was not to be found. Squires, the other witnesses, then proved that the will was duly executed by John Wright in his presence and that of the witness Berry; and that each of them subscribed as a witness, at the request of Wright; Berry subscribing in the presence of this witness.

Squires also proved that he was sent for by Wright to attest this will. That when he came, Wright and Berry were together. That Wright requested this witness to leave the room until Berry read over the will to him. That after remaining out of the room some time he was called back, and then the will was executed, as stated above. That the whole of the will was in Berry's hand-writing. It was also proved, on the part of the plaintiffs, that Wright had made a former will which was also written by Berry; in which the legacies and devises were nearly the same as those contained in this.

The defendants then offered to prove, that Berry was not a credible witness. This was objected to; but the Court overruled the objection and permitted the testimony to be introduced. A number of witnesses proved, that Berry's general character was such, that he was not entitled to be believed, on his oath. It was then attempted to discredit

Squires, the other witness. The only evidence to this effect was, that of two witnesses, who deposed that soon after Wright's death, they had heard Squires say, he had not heard Wright acknowledge it to be his last will, and if it was not proved till they proved it by him, it would never be done.

All the witnesses, and these two among the rest, deposed, that Squires had always borne an excellent character for probity and honesty; and that they would not hesitate to believe him on his oath.

The court, after recapitulating all the evidence in the course of the charge to the jury, told them, that if they believed the evidence of Squires, although Berry was not a credible witness they ought to find that it was a will.

The jury found that it was not the will of John Wright. A new trial is moved for on the grounds that the evidence as to Berry's credibility, was improperly admitted and tended to give an improper bias to the jury, and that the jury found a verdict directly contrary to the evidence.

It is agreed, that the foregoing case be submitted to the Supreme Court; and if they are of opinion, that a new trial be granted, then that the verdict be set aside and a new trial granted; otherwise the verdict to stand.

Cameron, J. delivered the opinion of the court.

This case gives rise to no question of law. The matters of fact having been passed on by the jury, their verdict must stand; and the motion for a

New trial must be overruled.

B. HAWKINS *vs.* P. HAWKINS—Page 627.

A trustee defendant, having a legal interest altogether nominal, is an incompetent witness at law, but not in equity, as to merits or designs of the trust deed.

The question in this case arose upon the admisibility of the deposition of C. Marshall, under the following circumstances. Marshall was an original defendant in this bill in equity, in which it was charged that certain dees were delivered to him as a trustee to be re-delivered to P. Hawkins, deceased, upon his request, which he made in his lifetime, but Marshall refused to re-deliver them. The bill contained a prayer for the delivery up of the deeds, which it appeared had been delivered up to P. Hawkins, jun. the defendant's son, after the death of P. Hawkins, deceased, to whom the promise had been made. The deeds were annexed to the answer of Marshall, and they were proved and recorded, and his answer submitted it to the court to do with them what might be just. The deposition of Marshall had been taken, subject to all just exceptions, and the object of it was to show that he was a subscribing witness to the deed, that they were delivered unconditionally, and that he kept possession of them during the lifetime of P. Hawkins, deceased, with his consent and approbation.

Marshall afterwards died, and the suit has not been revived against his representatives.

Upon several issues submittdd to the jury, they fonnd that Marshall was requested by P. Hawkins, deceased, of his own will, te re-deliver the deeds, which he unjustfiably refused to do.

The question was argued by *A. Henderson*, and *Gaston*, in support of the deposition, and *Browne*, against it.

The grounds assumed in favor of the deposition were, that when Marshall attested these deeds, the defendant acquired an interest in his testimony, of which he could not afterwards be deprived without his own act. That any subsequent in-

terest of Marshall's cannot render him incompetent. That the interest must exist at the time the fact happened which the witness is to prove, or be thrown upon him by operation of law, or the act of the party calling him. If a witness were allowed to disqualify himself, or if the adverse party could deprive the party calling him, of the benefit of his testimony, the utmost injustice would ensue. *Bent* v *Baker*, 3 Term Rep. 27. It was further urged that Marshall was a mere formal party, having no interest in the cause; and the suit being now in progress without being revived against his representatives, shows the light in which the plaintiff made him a party to the bill. 2 Atk. 229. 2 Vesey 220.

Against the deposition it was urged, that persons interested are excluded from giving testimony. Gilb. Law Ev. 121, 2. Also those who are stigmatised.—Ib. 142.

If an instrumentary witness, after subscribing, becomes interested as executor or administrator of the obligee, his hand-writing may be proved as if he was dead. 1 Str. 34. 1 P. Wms. 289. So if such witness afterwards becomes infamous. 2 Str. 833.

If an instrumentary witness is interested at the time of subscribing, and at the trial, he cannot be a witness; nor can his hand-writing be proved. 5 T. R. 371. Esp. N. P. 258.

It is charged in the bill, and also found by the jury on the trial of the issues, that the deed for the re-delivery or setting aside of which this bill was brought against Charles Marshall and P. Hawkins, jun. was delivered to the said C. Marshall, on trust to re-deliver it to P. Hawkins, sen. if he should require him so to do: and also that the said P. Hawkins, sen. did require the said C. Marshall to re-deliver the said deed to him, P. Hawkins, sen. which he the said C. Marshall refused to do, and in breach of his trust, delivered it to P. Hawkins, jun. the other defendant. Under such circumstances, the deposition of C. Marshall, taken while the bill was pending against him, cannot be read in evidence; because he was *at least*, liable to costs. 3 Atk. 401. *Barrett* v *Gore and Umfreville* in point. Nay, if P. Hawkins, jun. should be unable to compensate the injury sustained, C.

Marshall would be decreed to do so. 3 Bro. Ch. Rep. 112. 1 Vesey, jr. 206.

The witness, C. Marshall, was placed in this situation with the consent of the other defendant, P. Hawkins, jun. who received the deed from him, and now wishes to use his testimony in exculpation of them both. He hath poisoned the source, and now insists that we shall drink of the stream.

The *dicta* that "if, after the event, the witness become interested by his own act, without the interference or consent of the party by whom he is called, such subsequent interest will not render him incompetent, Peake's Ev. 157, 8, and if they be law, do not apply to this case. This doctrine is mentioned in *Bent* v *Baker*; but that case was not decided on it; and Lord Kenyon calls it a minor point. It is not easy to imagine a case to be decided upon this distinction. In *Allen* v *Hearne*, 1 T. R. 56, a wager between two voters was held to be void, as having a tendency to induce bribery and corruption at elections. And ought not a wager, or any other contract or transaction by which a witness attempts to gain an interest concerning a suit in which he is to give testimony, to be also void, as having a tendency to induce perjury?

If a witness is convicted of perjury, or otherwise becomes infamous, the party loses his testimony, however material it may be: and why shall he not, if the witness becomes interested? Interest disqualifies from giving testimony as completely as infamy.

Taylor, C. J. delivered the opinion of the court:

It appears from the statement sent up, that the character given by the bill to C. Marshall, is that of a trustee, and the question is, as to the competency of his testimony? Upon this subject there is a variance in the practice of courts of law and equity. In the first, no person made a defendant can be a witness, unless in some particular cases where he is improperly made a defendant, and there is no proof against him; in which case, the jury are directed to pass upon him, and upon acquittal, he is received as a witness. In the

Court of Equity, it is frequently necessary to make a person defendant for the sake of form ; and then it is almost a matter of course to examine him upon motion. Where a trustee has the legal interest in an estate, but is in all other respects nominal, he cannot be examined at law as to the merits or design of the deed, but there are several authorities to show that he may be admitted in equity. It is not to be understood, that these rules of evidence at law and in equity differ in general, but only in particular cases. Where fraud is charged by a bill, or the inquiry is relative to a trust, the jurisdiction of this court would be greatly circumscribed, and its power of fully investigating the latent elements of a transaction over which artifice sometimes spreads the thickest disguise, much abridged, if it were confined within the strict rules prescribed by courts of law. In *Ambler* 393, a trustee plaintiff was examined on behalf of a defendant. In 1 P. Wms. it was ordered that the defendant might examine one of the plaintiffs who were assignees of a bankrupt as a witness for the defendant. In Gilb. Eq. Rep. 98, it is said, that a defendant may be made a witness because he is forced into the suit. In *Ambler* 592, the deposition of a trustee was admitted to be read as to the quantity of trust money in her hands. In 2 Vesey 629, it is said that when a trustee or attorney is a defendandant, the objection goes only to his credit. If he is *particeps fraudis*, or interested, it goes to his competency. We cannnot consider Marshall in any other light than as a formal party. The suit is not revived against his representatives, and they, therefore, cannot be liable to a decree or the costs.

There must be a new trial, and his deposition is allowed to be read.

Note.—See *Jones* v *Bullock*, 2 Dev. Eq. Rep. 368. *Falls* v *Carpenter*, 1 Dev. & Bat. Eq. Rep. 237. *Williams* v *Maitland*, 1 Iredell's Eq. Rep. 92. *Lewis* v *Owen*, Ibid 290.

ARRINGTON vs. HORNE—Page 631.

A court of law cannot look into the *equitable* claim of persons who are, or are not parties, but must dispose of each case as the rules of *law* direct. Hence a release from an equitable assignee of a bond shall not be admitted to defeat a suit in the name of the legal owner of such bond.

Defendant offered, and was permitted to read in evidence the deposition of a Mr. Hardy. It stated, that he had purchased the bond on which the present suit was brought, pending the action, and that this purchase was from the plaintiff, and for a valuable consideration; that this purchase was without writing, and accompanied with the delivery of the attorney's receipt for the bond; that afterwards deponent, for a valuable consideration, sold the interest in the said bond to a Mr. Purnell, and that he had made an endorsement to that effect, upon the receipt of the attorney; which receipt was produced in court, endorsed as stated by the deponent. Defendant then offered in evidence the receipt and release of Purnell in discharge of the bond; which release contained on the part of Purnell, a covenant of indemnity to defendant. Defendant also offered in evidence, a settlement of mutual dealings between himself and Purnell, at the time the amount of the bond was taken into consideration and the receipt given. Plaintiff then gave evidence, that at the time he parted with the attorney's receipt for the bond, that the interest of the bond was sold conditionally, namely, that Hardy was to give surety to a bond that day executed to the plaintiff, and that he had called on Hardy to do so, and that he failed, and soon after became insolvent and was dead. Plaintiff further gave in evidence, that he gave notice to Purnell and defendant before the payment and receipt, but after Purnell's purchase, that he claimed the interest in the bond. It further appeared in evidence, that the plaintiff had brought suit on the bond given by Hardy, before mentioned, recovered a judgment, and that Hardy was taken in execution and swore out of jail.

This evidence was all given to the jury, subject to the charge of the court: and the court directed the jury, that neither the receipt or evidence of settlement amounted to a payment, who found accordingly; and upon motion for a new trial, the same is transmitted by order of this court to the Supreme Court.

SEAWELL, J. delivered the opinion of the court:

This may be a hard case, but sitting in a *court of law*, the plaintiff must prevail. We cannot look into the *equitable* claim of persons who are, or are not *parties*, but must dispose of each case as the rules of *law* direct. Whether, therefore, the plaintiff has parted with the *beneficial* interest in the bond on which suit is brought so as to enable such assignee in *equity* to discharge it, must be referred to the rules of a Court of Equity. According to the rules of law, the right of action still remains in him, and as such must be respected. He having done no act which in *law* has *passed* his interes, nor which in *law* has defeated such right of action, there is nothing by which a court of law can restrain him. The idea of defendant's paying in *good faith* to one he supposed *authorised* to receive, is entirely excluded, from the circumstance of his taking a bond of indemnity. And to *him*, therefore, he acted with his eyes open, and during the pendency of the present action.

Wherefore, we are all of opinion, that the rule for a new trial, be discharged.

NOTE.—See *Jones* v *Blackledge*, ante 457.

STATE *vs.* EVERIT—Page 633.

In an indictment against an overseer of the road, it is necessary to show that he had been served with a notice of his appointment ten days before the offence charged.

This was an indictment against the defendant as the o-

verseer of a road, charging the said road to have been out of repair. The defendant had pleaded 'not guilty.' Evidence of the defendant's having acted as overseer, was offered on the part of the State. It was objected, that no evidence other than the record of his appointment, was admissible to charge the defendant as overseer. A juror was withdrawn by order of the court, and without the consent of the defendant. And it is referred to Supreme Court, whether any other evidence than the record of his appointment from the County Court, be admissible for the purpose of showing the defendant to be the overseer, and whether defendant can again be put upon his trial.

PER CURIAM.

This case must be governed by the regulation which the Legislature has thought proper to make on the subject; and as the act of 1812 has declared that an overseer shall not be responsible for the insufficiency of the road, until ten days after he is served with notice of his appointment, such notice and the time of service form an indispensable part of the testimony before legal guilt can be inferred.

STATE *vs.* BRIGHT—Page 634.

Where, in an indictment for extortion, the jury found that the defendant took more than his legal fees, but did not take them corruptly, such finding is equivalent to a verdict of acquittal, and the defendant must be discharged.

This was an indictment against the defendant, who is Register of Lenoir county, for taking a greater fee for copying a deed than the law allows. Upon 'not guilty' being pleaded, the jury found that the defendant took more than his legal fee, but that he did not take it corruptly.

A motion was made in behalf of the defendant, that the verdict be entered up as one of acquittal; and a motion was

made on the part of the State, for a *venire facias de novo.*

Lowrie, J. The jury having found that the defendant did not take the fee charged in the indictment *corruptly*, have, by their verdict, negatived the very *gist* of the indictment, it is equivalent to a verdict of 'not guilty.' The defendant, must, therefore, be discharged.

Note.—See *State* v *Avera*, N. C. Term Rep. 237. *State* v *Arrington'* 2 Murph. Rep. 571.

JEFFREYS AND OTHERS *vs.* ALSTON—Page 634.

A petition to set aside the probate of a will must be accompanied with an affidavit made before a person competent to take it—one made before a magistrate of another county will not be sufficient.

Daniel, J. delivered the opinion of the court:

This was a petition to the County Court of Franklin to set aside the probate of William Jeffreys's will and re-examine the same for the several grounds mentioned in the petition. The practice in cases of this kind has been settled by this court in the case of *Moss and Wife* v *Vincent*, an affidavit must be annexed to the petition "verifying the facts on which it is sought to set aside the probate of a will." It appears that the accompanying document alleged by the petitioners to be an affidavit, was sworn to before William Boylan, Esq. one of the justices of the peace in and for the county of Wake. We are all of opinion, that the deponents could not be convicted of perjury, provided the contents of said document were false, as the justice of Wake county had no legal authority to administer an oath to any person to prove the contents of an affidavit which was to be made use of in the County Court of Franklin.

The court are of opinion, that as this petition stands without any accompanying affidavit, it must be dismissed.

Note.—See acc. *Moss* v *Vincent*, ante 414.

GERVIN *vs.* MEREDITH—Page 635.

The rule of admitting hearsay to prove the boundaries of land must be confined to what deceased persons have said; for if they are alive at the time of trial, though out of the State, their depositions must be taken.

This was an action of trespass *quare clausum fregit.* The plea '*liberum tenementum.*' The dispute is altogether as to the boundaries of two tracts of land.

The declarations of a man by the name of Wingate, who lived on the land upwards of twenty years ago, and who was the tenant and son-in-law of the person under whom the defendant claims, were offered in evidence by the plaintiff and admitted by the court.

The jury found a verdict for the plaintiff; and a motion was made for a new trial, on the ground that the evidence of Wingate's declarations should not have been admitted, *as he is now alive,* but lives in the State of Tennessee, and beyond the process of this court.

CAMERON, J. delivered the opinion of the court:

The rule which allows hearsay evidence to prove the boundaries of lands, restricts it to the declarations of *deceased* persons. We do not conceive that the circumstance of the witness living out of the State, authorises any relaxation of the rule. The testimony of the witness, though living in Tennessee, might have been procured by deposition. The declarations of the witness, not on oath, was not the best evidence, which it was in the power of the party offering it to adduce.

We are, therefore, of opinion, that the rule for a new trial should be made absolute. A new trial granted.

NOTE.—See acc. *Hartzogg* v *Hubbard,* 2 Dev. & Bat. Rep. 241.

STEELE, CHAIRMAN &c· *vs.* HARRIS—Page 636·

When the clerk of the county Court acted as deputy clerk of the Superior Court, and promised the appellant to file the appeal, and, though he did not actually place the papers in the office, considered them as filed, and so informed the clerk of the Superior Court, but the papers were not actually filed until a week before the court, a *certiorari* was granted.

This was an application, on the part of the defendant, under the following circumstances. At the sessions of the county court of Rowan, when the verdict was taken against the defendant, he prayed an appeal, which was granted; and his attorney prepared an appeal bond, and requested the clerk of the County Court to send it or take it up with the other papers, who promised to do so. The clerk of the Superior Court was absent from the State a considerable time, and the county court Clerk transacted business for him; but the latter was also in the habit of returning all appeal papers to the Superior Court, and these papers he undertook to file in time. He accordingly brought them to the town where the office was kept, but neglected to leave them. He, however considered them as filed, and so informed the clerk of the Superior Court upon his return. The clerk of the Superior Court returned three weeks before the sitting of the court, but the papers were not actually filed till the week preceding the court, and then it was that the information was given him that the clerk of the county court considered the papers as filed. The Superior Court office is kept seven miles distant from the County Court.

The plaintiff also moved to amend the writ.

Cameron J. delivered the opinion of the court:

The circumstances disclosed by the affidavits filed in this case, show, that a failure of justice will probably occur, unless the party who has without fault failed to obtain a new trial by appeal, is assisted with the process which he prays.

Let a certiorari issue, with leave to the plaintiff to amend his writ.

Note.—See *Davis* v *Marshall*, 2 Haws 59. The clerk of the County Court is now required to carry up the appeal himself, 1 Rev, Stat. ch. 4, sec. 3.

BAKER *vs.* MOORE—Page 637.

When, in entering up a verdict, a mistake is made in computing interest, and judgment is entered up for less than the plaintiff is entitled to, but such mistake is not discovered until the next session of the court, leave to amend must be refused; for there is nothing to amend by, and to alter it would be to make a new verdict for the jury.

Debt on bond in the County Court of Hertford, where at May Sessions 1815, a verdict was found for the plaintiff, but by mistake in calculating interest or entering up the verdict there was a deficiency of $61 46. At August Sessions 1815, the mistake was discovered and a rule obtained on the defendant to show cause why the verdict should not be amended and an execution issue for the deficient sum. This rule was made absolute at February Sessions 1816, and the defendant appealed to the Superior Court, whence the case was transmitted to this court.

Brawne, in support of the amendment, cited 1 Wils. 33. 2 Str. 1197. 1 Salk. 47. Dougl. 376. 3 Term Rep. 349, 659, 749.

Per Curiam.

This is a motion to amend the verdict after judgment, and where there is nothing to amend by. We recollect no precedent of such a case. To permit it here, would be to make a new verdict for the jury.

Motion overruled.

Note.—See *Dunns & McIlwaine* v *Batchelor*. 3 Dev. & Bat. Rep. 52.

ALLEN'S ADM'R *vs.* PEDEN—Page 638.

An act of the Legislature, emancipating slaves belonging to the estate of an intestate, without the consent of the administrator, is unconstitutional.

Detinue for two mulatto children born of a negro woman slave, and reputed to be the children of Allen, who in his lifetime conveyed some property to each of them, and on the back of the deed, expressed a desire that they should be emancipated. After the death of Allen, administration with the will annexed was granted to the plaintiff, and the Legislature, without his consent, passed an act emancipating the children sued for.

CAMERON, J. delivered the opinion of the court:

The administrator in this case, was, in law the owner of the persons emancipated by the General Assembly. The act of emancipation passed not only without his consent, but against it. However laudable the motives which led to the act of emancipation, it is too plainly in violation of the fundamental law of the land, to be sanctioned by judicial authority.

We are compelled to pronounce it a nullity, and to give judgment for the plaintiff.

TAYLORS'S N. C. TERM REPORTS.

At July Term, 1816.

BRADBERRY *vs.* HOOKS—Page 1.

When a patent calls for a stake in the line of another patent, and then a certain course "with or near" a line of the latter, it must stop at the intersection with the first line of the latter, if the second line from that point would run *with* or *near* the line of the patent called for, but would not do so if run from the intersection with the second line.

The court will not decide on the admissibility or effect of evidence respecting the actual running a line, when such evidence was not introduced; as such a question is purely abstract.

This was an action of Tresspass *qaare clausum fregit*, tried before Seawell, J. at Wayne Superior Court, where a verdict was found under the charge of the Judge, in favour of the defendant. A motion for a new trial was made and overruled; from which judgment the plaintiff appealed to this court.

The case as disclosed by the testimony, and the charge of the Judge, as stated by himself, were as follow:

The trespass for which the action was brought, was charged to have been committed between the parallel lines in the Diagram B C and N Y. Hook's 90 acre patent was ten years older than the one under which the plaintiff claimed; Hook's 100 acre patent is seven or eight years younger than the plaintiff's. The boundaries of Hook's 90 acre patent are delineated in the Diagram, and the beginning is at the index at E, then to F, G, H, and I, at another index, and thence to the beginning. The location of Hook's 100 acre patent is also represented. The controversy between the parties, was, Whether the Plaintiff's patent shall stop at Hook's line at the letter N or should continue the same course to Hook's line on the other side of the patent at letter O, and even on to B. at some distance beyond.

The words of the plaintiff's patent were, "Beginning at a pine, in or near his own line, and runs S. 240 poles to a stake in William Hook's line, then with or near his line N. 73° E. 400 poles to a stake, then N. 305 poles to a pine, thence to the beginning."

The plaintiff proved old marked lines from between A and N, and one witness said that when they were surveying the land since the present action, he saw a chopped tree in Hook's 90 acre patent, about 40 or 50 yards from the corner, in imitation of a marked tree. Upon cross examination he admitted that he did not show it to the surveyor. Part of this patent was but thinly timbered.

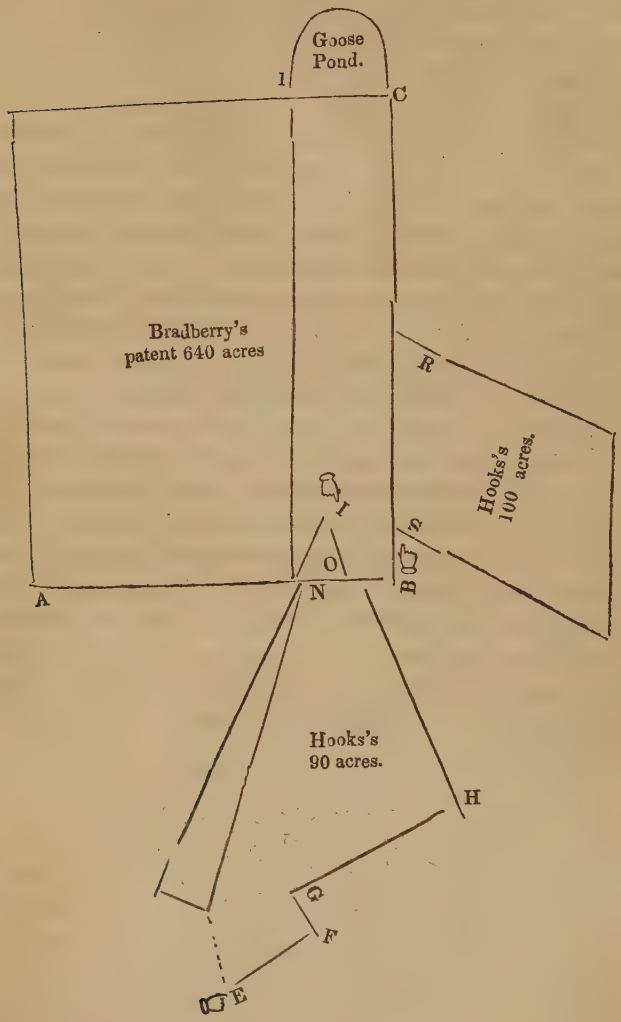
Several of the plaintiff's witnesses also proved old marked trees between the corners S and R of Hook's 100 acre patent; and the Deposition of old Hooks, the patentee, stated, there were marked lines when his patent was run out. This patent of Hook's called for a beginning in Bradberry's line; which begining is at S. The same witness said that Bradberry informed him that the patent in dispute was not surveyed till after the grant came out.

The plaintiff then proved by the same witness who spoke of the chopped tree in the 90 acre patent, that about 41 years ago he was shown a pine by Ritter, near C, as the corner of the patent in dispute, and it was then a marked tree resembling a corner. Ritter was one of the chain bearers to Bradberry's patent. The same witness further stated, that the patentee informed him that the land was not actually surveyed till after the patent. They had begun to survey it; but it began to rain, and discovering that they enroached upon old patents, they retired to a house and there platted it. He also said, that he had seen the tree years back; was as well acquainted with the place as with his yard; and thinks it was near C; but he could not find it since the dispute, nor discover any vestige of it, though he had frequently searched, and particularly for the surveyors: That it was in the goose pond, where there were a number of pines, some of which now appear to be dead. The witness added, that Ritter the son in law of the patentee, claimed this goose

pond under the patent ; and upon his cross examination respecting what the patentee had said, he stated the assertion of the latter to have been, that his second corner was on the west side of Buck Marsh on the hill, and that Hooks's Negroes had cut it down.

The Judge, in his charge to the jury, directed them that as the first line of the patent called for a stake in Hooks's line, and the second line called for a course and distance running with or near Hooks's patent, to another stake, the patentee was precluded by the terms and expressions of the grant, from going beyond Hooks's first line ; but, in conformity with the words of the patent, must run to the corner called for, it being near or with Hooks's line as represented on the plat ; and that the boundary of the patent to Bradberry could not be extended beyond the first line of Hooks's, though it might be proved by a hundred witnesses, that the land had been surveyed before the patent issued, and that the surveyor actually run across, marking the trees, and made a corner. That the patent calling for a stake, which the court considered as an imaginary point, and this to be in Hooks's line, whether the distance be longer or shorter, the first line must terminate there ; and that the marked pine, if sufficiently proved to have been near C, was, for the same reason, to be disregarded , and that, in point of Law, the defendant was entitled to their verdict.

DIAGRAM.



Mordecai, for the Appellant.

The question to be decided by the court in this case, is not whether the evidence offered by the plaintiff was suffi-

cient or insufficient to entitle him to e verdict, but whether admitting its sufficiency in point of fact, it was admissible in point of Law. In other words, the question is, whether, when a deed or patent calls for a stake in a line, any evidence is admissible to show, that in fact, the line, is not the place of termination. Another questien is, whether, when there are two lines, each answering the description of the patent, the patentee must, of course, stop at the line he first reaches, or, whether he may show, by evidence, that the second line is the one called for by his patent. The several matters of evidences stated in the case do not require to be noticed, as his Honour who tried the cause below gave it in charge to the Jury, "That the patentee was precluded, by the *terms and expressions of the grant*, from going beyond Hooks's first line, though it might be proven by a hundred witnesses, that the land had been surveyed before the patent issued, and that the surveyor actually ran across, marking the trees, and made a corner. That the patent calling for a *stake*, which the court considered an *imaginary* point, and this to be in Hooks's line, the first line must terminate there; and that the marked pine, if sufficiently proven to have near C, was, for the same reason, to be disregarded; and that, in *point of Law*, the defendant was entitled to their verdict. Therefore, whatever impressions the evidence offered by the plaintiff might have made on the jury; although, from the evinence of the marked tree in the triangle, they might have been convinced that the surveyor did run across; although, from the declarations of the patentee, extorted from the witnesses, on the examination, that his corner was on the hill at B; although the declarations of the chain carrier, that the pine near C, marked instead of the stake, was the third corner of the patent; and however strongly these impressions might have been confirmed by the recognition of old Hooks, of the line B C as the patent line, within a few years after the patent was granted, by his calling for a beginning in that line at the letter S, and by his evidence that it was a marked line at that time, yet they were directed to forego all these considerations, ane instructed, that in

point of Law, the Plaintiff could not recover, but must stop when the first line of his patent first met Hooks's line. Of this, as we humbly conceive, misdirection of the court, we compiain, and of this we ask a revision.

And, first, we say, that if the Bradberry patent, instead of calling for a *stake* in Hooks's line, had called for Hooks's line, that we might be permitted to show that the surveyor actually ran to another place.

Secondly, that as the patent calls for a stake in Hooks's line, we may be permitted to show, that the stake called for, and to which the surveyor run, stands in another place.

Thirdly, that as Hooks has more than one line, and we call for a stake in his line, we may show in which of his lines the stake stood.

As to the first point. The only objection which can be raised to a party's showing by evidence that the actual location of his land varies from the description of the patent, is, that parol evidence is not admissible to contradict a deed. How it happened that this rule of evidence was first departed from in cases of boundary, is not necessary to be enquired into. Perhaps the reasons given by MOORE, J.* may be sufficient. Whether they are so or not, by the repeated decisions of our courts it has become a rule, too well established to be overturned by any thing short of legislative authority, that the description contained in a deed or patent may be corrected by parol testimony.

In *Bradford* v *Hill*,† it was argued by counsel and assented to by the court, that where there was a marked line, varying from the description given in the patent, that line should be regarded as the true one.

In *Branch* v *Ward*,‡ the patent called for a south course. But upon proof that the surveyor actually ran North, that there was a marked line agreeing, in appearance, with the date of the patent, and a corner marked at the termination, the plaintiff was permitted to recover. Here *parol evidence* was admitted to show, that though the *deed* called for a *south*

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* 2 Hay. 100. † 1 Hay. 22. ‡ 1 Hay. 23.

course, it was mistaken, and that the surveyor ran *north*.

In *Eaton* v *Person*,* the deed, after describing the first line, called for a course and distance which would leave out the piece in dispute. Evidence was given that the land was comprehended within three lines actually run and marked, and the river. And on this evidence the patentee prevailed, contrary to the terms of his deed.

Here the parol evidence contradicted the course and distance of the deed, and threw out one line described therein and substituted two others; making the land a square instead of a triangle.

In Beatty's Case† the judge said, "If a course and distance be called for, and there is a marked line and corner, variant from that course, which is proven to be the line made by the surveyor as the boundary, that marked line shall be pursued." Here parol evidence was permitted to contradict the deed.

Person v *Roundtree*,‡ in note, decides that the marked line, really made as the boundary, is to be followed rather than the course mentioned in the patent.

Loften v *Heath*,§ the defendant's patent called for a cypress, as the beginning. He contended, that a pine was the beginning. Both trees were found. The Judge says, "I will not say whether it was wise or not, in the first instance, to depart from the words of a grant; but many decisions in our courts have allowed of such a departure in order to fix the location where it really was made originally. It must now be taken as the law of this country, that notwithstanding any mistake or wrong description, in either the plat or patent, the party may, by parol testimony, show the mistake, and prove the location of his land by testimony, dehors the patent."

Blount v *Benbury*.¶ "There have been may decisions in this country which warrant a departure from the line described in the deed or patent, to follow a marked line which the Jury believe the true one.

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* 1 Hay. 23. † 1 Hay. 377. ‡ 1 Hay 378. § 2 Hay. 347.
¶ 2 Hay. 353.

The cases abundantly prove the uniformity of decision which has heretofore prevailed in our courts, as to the competency of parol evidence to rectify a mistaken location contained in a patent. In not one of the cases mentioned, was there such a latent ambiguity, as by the English Law, might be explained by parol. Every case is one of direct contradiction. It is a rule of evidence established by our courts, from the necessity of the thing and the situation of the country. It has been acted upon for years, and by every Judge who has presided in our courts. Scarcely a question of boundary has been tried where this rule of evidence has not been made subservient to the purposes of justice and accurate investigation.

How is the present case to be distinguished from those which have gone before it, where this rule has prevailed? Where a course and distance are called for in a deed, as the only guide to the point at which the line should stop, if the deed were solely to be regarded, no parol evidence could be received. Yet, in the case of *Branch* v *Ward*, it was received. The case of *Loften* v *Heath*, went still further. The patent not only called for a course and distance, but a *cypress*, as the beginning; an object susceptible of being as clearly identified as the line of another tract. Yet the parol evidence was admitted to prove the beginning at a pine on the opposite side of the tract, by which the courses of the patent were reversed. Wherefore, then, shall we not be permitted to show, that instead of stopping at Hooks's line, we actually ran on to the letter B. Even in the case of natural boundary, which, by some gentlemen, is regarded with superstitious reverence, the same thing has been done. I do not now allude to the Cat-tail case. Perhaps in that, there was something like a latent ambiguity. But as I have cited Nisi Prius cases from books, I will now cite one from memory, which in point of authority with me and with the people of this State, is equal to that of any decision made by a single Judge. In the case of *Glasgow* v *Wooten*, the plaintiff's deed called for a beginning at Cotentnea Creek below the mouth of the Brushy branch, then to the Brushy branch, and

with the same to where it crossed the back line of the patent, with the patent line to the road; then a course and distance to a maple in a swamp; thence to the creek, and down the creek to the beginning. The Brushy Branch, a short distance from the mouth, forked. The north prong kept that name, and the south the name of the Spring Branch. The land in the fork was in dispute. If the plaintiff was confined, by the words of his patent, to follow the Brushy Branch, he had no title, nor unless he could follow the Spring Branch contrary to the words of his deed. But according to the truth of the case, the land was his. He proved by witnesses the declarations of James Glasgow, under whom he claimed, and these, together with other circumstances, convincing the jury that the Spring Branch was meant, though the Brushy Branch was called for, he, under the charge of the court, obtained a verdict, contrary to the terms and expressions of his deed. Here was no latent ambiguity. There was a Spring Branch and a Brushy Branch. We called for the Brushy Branch, and were permitted to prove the Spring Branch as our boundary. What more do we ask here? We call for one place as our boundary, and ask leave to prove another.

But if that, which has so long been considered a rule of evidence in this State, is now to be rejected, I apprehend that the second point is with the plaintiff. If when a patent merely calls for the *line* of another tract, no evidence can be received to show that the line had a different termination, yet when it calls for a certain object, parol evidence may show where that object is, although the patent says it is to be found in the line of another tract. If indeed it can be established by any course of abstract reasoning or physical experiment, that a *stake* is a mere imaginary point, then the calling simply for a line or for a *stake in a line* will amount to the same thing. But suppose the patent had called for a noted rock, standing in a *line*, and the rock stood, in fact, out of the line, there can be no doubt but that the line would terminate at the rock. So of a tree: it makes no odds, whether alive or dead, or whether it remained attached to

the earth by the roots or driven in the form of a stake by the hands of man. Wherever that rock, tree, or stake is, the line must terminate. The line in which it is described as standing, is a mere index to find the place. We do not contradict the deed by leaving the index: We fulfil it. You are sending your servant to Raleigh, who perhaps has not been accustomed to great cities, and thinking that he may be embarrassed in finding Brame's Hotel, among the theatres, palaces, churches, reading rooms, museums, market places, and stone fountains, you tell him that he will find it in that section, division, or ward of the city, which is called St. Domingo. Now this direction happens to be mistaken. But the object being to discover Brame's Hotel, and St. Domingo being given merely as an index, the most obsequious servant would be justified in going to the place, disregarding the index. Now perhaps it may be, that frequently it may happen that a surveyor calls for a stake without planting one. If so, the point is imaginary; and the *line*, where it is *said* to be, is the boundary. But this is not necessarily th case. It is not a matter of ***Law*** that a *stake* is an *imaginary* point: It is a matter of fact for inquiry by a jury. As therefore the judge, in his charge to the jury, stated as a matter of ***Law***, that a stake was considered as an imaginary point, I humbly conceive for this cause, there should be a new trial.

But if I am unfortunate upon this point and it is a conclusion of law, and, of course, not to be contradicted, that a *stake* is an *imaginary* point; and, therefore, that whether a line of another tract, or a stake in such a line, be called for, amounts to the same, I will pass on to the third point; only regretting in this place, for the sake of *Mary's martyrs*, that the fact does not correspond with the legal conclusion. Thirdly, The *Bradberry* patent calls for a course south 240 poles to *Hooks's* line. Now it appears from the plat returned by the surveyor, that a line running south from the beginning would intersect two lines of *Hooks's* 90 acre patent. Upon what principle of law are we prevented from going to the second line, if the jury believe that to be the correct

one? Here is a latent ambiguity. *The patent calls for a line:* It appears there are two lines. Is it not like the case of a gift to your son *John*, where you have two of the name; or a gift of *White Acre*, where you have two *White Acres*? Yet his Honour, in his charge to the jury, says that the patentee is precluded, by the *terms* and *expressions* of his grant, from going beyond *Hooks's first line.* It is true that the second line of the Bradberry patent calls, "with or near Hooks's line, N. 73° E." And stopping at the first line and running the course called for, will be *near Hooks's* line which is about N. 80° E. Whereas if it runs on to the second, it will not run so near Hooks's line, which is about N. 45° E. But this was matter of consideration for the jury, as to the probability or improbability that Bradberry stopped at the first line. It afforded no conclusion of law to prevent the plaintiff explaining the ambiguity arising from the two lines. And neither by this circumstance, nor by the *terms and expressions* of the grant was the plaintiff precluded from going beyond Hooks's first line.

Gaston, for the appellee.

As no survey was actually made in the case, there is not only no reason for departing from the words of the grant, but the utmost mischief would follow from establishing a precedent of the kind. If in any case such a departure is allowable, it can only be for the purpose of sustaining an actual location, which being once established, furnishes a standard by which to correct the mistaken description in a grant. There the transition is from error and mistake to certainty, and to a fact by which land was originally appropriated. Here it would be from the certainty of a grant, to a plat proved to be not the result of an actual survey, but made by the surveyor in a house, before the lines were run. The charge of the Judge was therefore correct, in instructing the jury that the law was in favour of the defendant. But even were the charge incorrect in any of its general statements, as to what the law would have been if the lines had been actually run and marked, the court will not award a new trial, where a second verdict must necessarily

be found for the defendant. So far as the evidence proceeded, it completely authorised the instruction given to the jury. Beyond the point where the evidence stops there is no way of ascertaining whether the charge was correct or not. It was merely hypothetical, and put by way of illustration. At all events, there is nothing for this court to decide upon, as there is no state of facts to raise the question of law.

PER CURIAM.

We are all of opinion, that the plaintiff is concluded by the terms of the grant from claiming beyond the first intersection with Hooks's line; inasmuch as the course, N. 73° E. called for in the grant, *will* run as also called for, *with* or *near* Hooks's line. Whereas if the first line is to proceed to the second line, or to be extended to the letter B on the plat described, the second line will *not* run with or near Hooks's line. As to the admissibility or effect of evidence of where the line actually was run when surveyed, that is an abstract question, not necessary, at this time, to be determined.

We are, therefore, of opinion, that the rule for a new trial should be discharged.

NOTE.—See note to *Bradford* v *Hill*, 1 Hay. Rep. 22; and in addition to the cases there referred to, see *Sasser* v *Herring*, 3 Dev. Rep. 340. *Carson* v *Burnett*, 1 Dev. & Bat. Rep. 546. *Flannigan* v *Lee*, 2 Dev. & Bat. Rep. 427. *Hough* v *Dumas*, 4 Dev. & Bat. Rep. 328.

Upon the second point, see *Freeman* v *Edwards*, 3 Hawks 5. *State* v *Benton*, 2 Dev. & Bat. Rep. 223.

TRUSTEES OF THE UNIVERSITY *vs.* BLOUNT—Page 13

Where a will of land appears to have been attested by two witnesses, and the certificate of probate states that it was proved by one, it will be intended *prima facie* that it was *legally* proved by him.

A will constitutes a colour of tittle and if accompanied with seven years possession will repen into a perfect one.

The death of a tenant before seven years, will not impede the progress of the act of limitations, provided the possession is continued a sufficient lenght of time after his death, by his heirs or others claiming under him.

This was an Action of Ejectment for a tract of land in the county of *Washington*, in which the Jury found a Verdict in favour of the Plaintiff, subject to the Opinion of the Court upon the following facts.

The Plaintiffs produced a patent for the land, issued before the year 1788, and deduced a title regularly from the patentee to themselves.

The Defendant relied upon a possession under the will of one *Hammond*, who devised the land to his son *James*. The will purported to be signed by two witnesses, and the probate, which took place at September Sessions 1788 of Chowan County Court, was in the following words: "The last will and testament of *James Hammond* was exhibited and proved by the oath of *Joseph Swift*, one of the subscribing witnesses:—Ordered to be recorded."

James Hammond took possession of the land in 1788 and continued in possession for two years, when he died, and his heirs took immediate possession; whtch has continued ever since. The questions submitted are,

1st, Whether this probate was sufficient to entitle the party to read the will as evidence of title?

2d, Whether the will is a sufficient colour of title to support the possession of those under whom the Defendant claims? And if it be, then, 3d, Whether, as *James Hammond* continued in possession only two years, the benefit of

this colour of title will enure to his heirs to support their possession?

Taylor, C. J. delivered the Opinion of the Court:

The question as to the form and regularity of the probate depends upon the construction of the Act of 1784, § 11; which, among other requisites to the validity of a will to pass real estates, calls for its subscription by two witnesses at least, in presence of the testator. The circumstances there enumerated are essential to the legal validity of the will, and their existence must be proved to the County Court, to authorise them to record the will. But it is not necessary to set them forth in the certificate of the clerk; because when it appears, as in this case, that the will was attested by two witnesses, and the clerk certifies that it was proved by one, the *proof* must *prima facie* be intended to have been such as the law requires. In other words, that the witness by whom it was proved, deposed also, that himself and the other witness subscribed the will in the presence of the testator. In the case of *Henry* v *Ballard & Slade*, 2 Car. Law Rep. 595, decided at the present term, the certificate of probate is much fuller than the present one, but still it omits the subscription of the witnesses in the testator's presence. The fact itself was proved at the trial, and the court held that sufficient, and therefore did not decide on the validity of the certificate of probate. Whether a probate could be sustained, when its form is such as to authorise a fair inference that any one of the ceremonies required by the act, had not been proved by the witness on whose testimony the will is ordered to be recorded, we do not decide. Such a conclusion cannot be drawn from the paper now exhibited, nor can it be perceived that it is otherwise exceptionable. Enough appears, to give operation to the rule, *omnia præsumuntur solemniter esse acta.*

There has been a continuity of possession under this will for near thirty years, and there is nothing to bring the plaintiff within any of the exceptions of the act of limitation. The circumstance of James Hammond having died at the end of two years, after being possessed of the land, did not

interrupt the progress of the act, because his heirs entered immediately without permitting any vacant possession to intervene. His possession then became theirs, and must be computed for their benefit. For it has never been understood, under any construction of the law, that the death of a tenant after a shorter possession than seven years, prevented the running of the act of limitation, where, notwithstanding his death, the land continued to be occupied by his heirs, or by others claiming under the same title.

Upon the whole, then, here has been a colour of title, accompanied by such a possession as has ripened it into a perfect one. And the defendant is, consequently, entitled to judgment.

NOTE.---Upon the first point, see *Blount* v *Patton*. 2 Hawks 237. *Morgan* v *Bass*, 3 Iredell's Rep. 243. Upon the second point, see acc. *Evans* v *Satterfield*, 1 Murph. Rep. 413.

VAN NORDEN *vs.* LITTLEJOHN AND BOND—Page 16.

A *pro rata* freight may be recovered from the shipper, if he abandons the goods to the underwriter after the voyage is broken up by the stranding of the vessel.

This was an action of assumpsit to recover a *pro rata* freight earned by the ship Cornelia of which the plaintiff was owner.

The cause was tried before HALL, J. in Pitt Superior Court, at September Term 1811, when the jury found a verdict for the plaintiff for £250, subject to the opinion of the court on the question, whether the plaintiff was entitled to judgment. Judgment was rendered in favour of the plaintiff by the Judge who tried the cause; from which an appeal was taken to this court, on the following case:

The defendants entered into a charter party with the plaintiff, by which they agreed to take the ship Cornelia on

freight, for a voyage from Perquimons River to Cadiz, and thence to New York. At Perquimons River she was to take on board a certain quantity of staves, with which she was to proceed to Wallace's Channel, where an additional quantity was to be put on board to complete her cargo, which was to be delivered to the dafendant's consignees at Lisbon, who were to pay the freight on the delivery of the cargo. The proceeds of the outward cargo were to be invested in wines at Lisbon, and brought to New York free of freight.

The ship received on board at Perquimons River, the stipulated number of staves, and proceeded to Wallace's Channel, where she was strained by the violence of a storm, and rendered unable to proceed on the voyage.

The cargo was abandoned by the defendants to the insurers, and it was sold by the Commissioner of Wrecks, under the authority of the Captain. The defendants became the purchasers and sold it to the Plaintiff. The ship was also abandoned to the insurers, sold and purchased by the plaintiff.

It was not proved that the defendants required the captain either to refit his ship, or to procure another to convey the cargo to the destined port; nor was it proved that the plaintiff made any offer to do so.

Gaston, for the plaintiff.

Browne, for the defendant.

TAYLOR, C. J. delivered the opinion of the court.

It may be considered as a setlled principle, that there are cases in which the shipper of goods is liable to the payment of a *pro rata* freight, notwithstanding the existence of a charter party; which provides that the freight shall be paid only on the delivery of the goods at the port of destination.

Some of these exceptions to the general rule are produced by an inevitable necessity; others are dictated by the clearest principles of Justice and equity, or founded on the tacit agreement of the parties.

If, for the preservation of the ship and the residue of the

cargo, a portion of it is thrown overboard, the merchant will be indemnified by a general average, but he is liable to the payment of the freight of the goods thus sacrificed, upon the arrival of the vessel.

Necessity may compel the captain to sell a part of the cargo for victuals and repairs; in which case, the owner of the vessel must pay the merchant the price which his goods would have brought at the destined port; but he may also charge him with the full freight in the same manner as if they had been safely delivered. Another corollary, from the same principle is, where a neutral vessel is taken, carrying the property of a belligerent, the captain is liable to the payment of full freight, because his act prevented the completion of the voyage, and is equivalent to an actual delivery of the goods to the consignee.

The law will likewise imply an undertaking to pay a rateable freight, from the owner's receiving the goods at a port short of that of delivery; where the ship is prevented by some disaster from prosecuting the voyage, and all expectation of ulterior profit, either to the owner or shipper, totally destroyed.

It has been long since established as a rule in the Marine Law, and is adopted by most of the commercial nations in the world, that the master may in such case hire another ship to convey the goods, and so entitle himself to his full freight. But if he is unable, or declines to do this, and the goods are there received by the merchant, he becomes entitled to a freight *pro rata*.

The principle was first distinctly recognized in England, in the case of *Lutwidge* v *Gray and others*, determined in 1733.

Lutwidge, the owner of a ship, let her, by charter party, to Gray and others, residents of Glasgow, for a voyage from Glasgow to Maryland or Virginia, and back from thence to Glasgow; and was to receive freight from them for the homeward cargo only. The ship sailed to Virginia and there delivered her outward cargo, and took on board a cargo of tobacco; part of which belonged to other persons, and was

aken to complete the lading. Gray & Co. insured their part of the cargo with persons living at Bristol. The other part was not insured. On the return homeward, the ship was cast away at Youghal in Ireland, which is within a short distance of Glasgow, and part of the cargo was saved and deposited in the custom office there. Lutwidge, as soon as he knew of the misfortune, informed Gray & Co. of it, and told them he should provide another ship to transport the tobacco which was saved. Gray & Co. abandoned their part of the cargo to their insurers, and endorsed over the bills of lading to them. Lutwidge provided another ship at Youghall, but the insurers took the part of the cargo abandoned to them, and conveyed it to Bristol. The agent of the proprietors of the other part of the cargo sent it to Glasgow in another vessel. Lutwidge brought an action against Gray and others, for his freight according to the charter party, in the court of Almiralty in Scotland, which, after a decision there and two decisions in the court of sessions, was finally adjudged in the House of Lords in England, who declared that Gray and others were liable for the full freight of such of the goods as were given up to the insurers, and for the freight *pro rata itineris* of such of the goods as were brought to Glasgow, notwithstanding some of the tobacco was found damaged and burnt there.

It is evident, that the full freight was allowed in this case, because the owner of the ship had provided another to transport the goods to Glasgow, of which Gray would not avail himself; preferring rather to abandon them to his underwriters. The *pro rata* freight only was allowed as to the others, because they had reason to suspect that the master of the hired vessel would not deliver the property at Glasgow, but at some other port; and therefore they were justifiable in providing a vessel for their own use.

In the case of *Luke* v *Lyde*, which occurred more than twenty years afterwards, the above doctrine was fully adopted; on which occasion Lord Mansfield says, "If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire

him to do so, the merchant is still entitled to a proportion of the former part of the voyage." 2 Burr 882. This doctrine is recognized in several subsequent cases; 1 Bos. & Pul 634; and as the recovery is not sought for on the charterparty, because it would then be necessary to prove a performance of the whole voyage, it can only be effected where the merchant receives the goods at an intermediate port, or does some act which is equivalent. Where the loss is total, no freight is due; but this total loss differs from a technical total loss as between insured and insurer. If part of the goods are saved the loss is not total as between the owner of the ship and the merchant. The latter, it is true, may avoid the payment of freight by refusing to have any thing to do with the cargo; but if he receive what is saved, he tacitly agrees to pay for the transportation.

Does an abandonment to the insurrer render the merchant equally liable to the payment of freight with an acceptance of the goods? It is believed by the court, that both acts stand upon the same principle, and cannot be distinguished from each other for the purposes of this case. The property remains in the merchant until some act is done calculated to divest him of it. The abandonment in this case, was the last exercise of an act of ownership, for purposes highly useful and important to the owner; since it transferred all his right to the insurer, and entitled him to recover for a total loss. For it is a general rule, that where the property is saved, but the voyage lost, the insured can only recover upon an average and not a total loss, unless he does abandon: otherwise, he might retain the property saved, and receive from insurer a full indemnity. But if the latter is to pay the whole insurance, he must have power to dispose of the property for his own benefit, that his loss may be rendered as light as possible. In the same manner, if the holder of a bill of exchange, in case of non-payment, fail to give notice to the owner, he is considered as giving credit to the acceptor; and, therefore, the loss, if any, must fall on him.

The master might have retained the goods for the freight-

earned, and, therefore, have withheld his consent from the abandonment, and sold the goods for his own compensation. Not having done so, he ought to be considered as having surrendered them to the defendants, for the express purpose of enabling them to abandon and recover for a total loss; and they should be considered as having accepted them for the same purpose, upon an implied promise to pay the freight.

HALL, J. This action is not brought upon the original contract entered into by the parties; because, on that contract, there could be no recovery by the plaintiff, as he himself has not performed it. But it is brought upon an implied assumpsit, to recover freight *pro rata itineris peracti.*

When the law imposes an obligation on any one, to pay a sum of money, it is because a benefit, some how or other, has previously arisen to such person. And I admit, in the case now under consideration, that if the defendant had received that part of the cargo which was saved, authorities are not wanted to show, that they would be bound to pay to the plaintiff freight *pro rata itineris.* But this was not the case. It does not appear that they were at all benefitted by it. They abandoned in favor of the underwriters, upon whom, (if upon any person), the obligation of paying freight was created, because they were the persons benefited.

Whether the Plaintiff, (as he was not requested by the defendant to procure another ship to proceed on the voyage) had not a lien on the cargo saved, for freight, as against the underwriters; or whether, as it was given up to them, the law would not raise an obligation upon them to pay freight *pro rata itineris*, it is not necessary now to consider. But such a course would seem to be more just, than that the defendants should pay it.

The case of *Lutwidge & another* v *Gray & others*, seems not to be applicable; because in that case the owner of the ship which was cast away, offered to furnish another ship and proceed on the voyage; in consequence of which he recovered full freight on the original contract, not upon an implied assumpsit; and the shippers in that case, aban-

doning to the underwriters, made no difference, because by their so doing, they could not exonerate themselves from their original contract to pay freight, to the benefit of which the plaintiff was entitled, as it was owing to no fault in him that the contract had not been executed on his part.

The same may be said of *Luke & another* v *Lyde.* In that case, the goods were not abandoned, but received by the freighter. Of course, as he was thereby benefitted, he was compelled to pay freight *pro rata itineris.*

In this opinion it is likely I may be mistaken, for two reasons; first, because, from local situation, I have not often been led to the consideration of such questions; and, secondly, because a majority of my brethren think so. But judging for myself, I cannot agree that judgment shall be entered for the plaintiff.

Lowrie, J. After long advisement in this case, a bare majority of the court has adjudged that the plaintiff is entitled to recover *pro rata itineris*; for I understand Judge Seawell as giving no opinion, having been employed in the cause before he left the bar; in which judgment I cannot accord.

Had the plaintiff brought his action on the original contract between these parties, no doubt, I suppose, is entertained by any one, but he could not have recovered. If, therefore, he can recover in this form of action, I suppose it is also admitted, that it must be upon a new contract, either expressed or implied. And I agree, the plaintiff ought to recover, if the facts of the case will warrant the court in finding the one, or implying the other. My brothers, who have decided this cause for the plaintiff, think they do, and that it fairly comes within the principles of *Lutwidge & others* v *Gray & others*, and *Luke* v *Lyde.*

The apportionment of freight usually happens when the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute or complete her voyage. In such case, the master may, if he will and can do so, hire another ship, and so entitle himself to his

whole freight; but if he is unable or declines to do this, *and the goods are received by the merchant*, the general rule of the maratime law is, that freight shall be paid *pro rata*, Abb. on Ship. 336. This rule, I admit, has been adopted by the courts of Law both in England and America. But let it be observed, that a part of the rule is, *that the goods are received by the merchant.* And I take it, that the receipt of the goods by the merchant himself, or by his agent, or some act of his, equivalent thereto, is in every instance necessary in order to subject him to the payment of freight, *pro rata itineris.*

In *Luke* v *Lyde*, 2 Burr. 882, & I Black. Rep. 190, Lord Mansfield said, it matters not if the goods are spoiled, *provided the freighter takes them*;" and he seems to ground himself upon the receipt of the goods, by the freighter or merchant, where he says, "There can be no doubt but that some freight is due; for the goods were not abandoned by the freighter, but received by him of the recaptors." In another part of his argument, in speaking of the power and authority of the merchant to exonerate himself from freight, he said, "If he abandons *all*, he is excused freight; and he may abandon *all*, though they are not *all* lost." I need not here quote authority either to prove, that upon a total loss no freight is due, or to show that this case is one of that description for which no freight was due, or could be demanded or recovered, except the defendants, by some act of theirs subsequent to the stranding of the ship and loss of the cargo, have made themselves liable thereto.

Here I find myself utterly at a loss to discover from this record how the defendants can be subjected to the payment of freight. There is no evidence that they ever received one cent of the property, either from the hands of the owner, master, or commissioners of wreck; nor is there evidence that their insurers did, or indeed that the part of the cargo saved from the wreck sold for more than the expense of salvage, or for what it sold. The record of the case only proves that the "Defendants abandoned their cargo to their insurers; that it was sold by the commissioners of wrecks, under the

authority of the master; and that they, the defendants, became the purchasers." This statement in part proves, that no part of the cargo ever did come to the hands of the defendants or their insurers. It is equally silent as to the amount of sales, or how the same was appropriated. This, it would seem to me, puts an end to the question of freight *pro rata;* for, most clearly, there must be a receipt of the goods by the merchant or some agent of his, in order to subject him to freight *pro rata itineris.* In the cases of *Lutwidge & How* v *Gray & al.* and *Luke* v *Lyde*, the court grounded itself upon the receipt of the tobacco saved by the insurers in the first case, and the receipt of the fish by the merchant from the recaptors in the last case.

I have, therefore, no hesitation in deciding, that upon the facts set forth in this record, the plaintiff ought not to recover.

But, placing this case on the footing the majority of the court has done, still I am humbly of the opinion, the plaintiff is not entitled to recover. This case is circumstanced very different from the case of *Lutwidge* v *Gray & Co.* The owner, in that case, as soon as he was informed of the disaster, gave notice *to the merchants* that he would provide another ship and complete the voyage. But to that, the merchant disagreed, abandoned the cargo to his insurers, and endorsed over to them the bills of lading, and they, the insurers, refused to have the tobacco carried to *Glasgow*, but took it into their own possession, and upon that statement of facts, the cause was decided in Parliament.

We are warranted in this, from the words of Lord *Mansfield* himself, who was of counsel in the cause.

In the trial of *Luke* v *Lyde*, his Lordship said, "If a freighted ship becomes *accidentally* disabled on its voyage *without* the fault of the master, the master has his *option* of *two* things, either to *refit* it, if that can be done in convenient time, or to hire *another* ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the

whole freight of the full voyage. And so it was *determined* in the House of Lords, in the case of *Lutwidge & How* v *Gray & al.*

As to the other part of the decision where the court decided that freight, in proportion to the part of the voyage performed, was payable, it was upon another principle, namely, that whereas the merchant refused to have his goods shipped on board the vessel that was provided unless the master would sign other bills of lading, which he refused to do; upon which, the merchant took the tobacco into possession, which must have been with the consent of the master, or full freight would have been due for that part also. Hence it was, that only freight *pro rata* was adjudged due and payable. Abb. on Ship. 336.

Upon these two principles, both the cases of *Lutwidge & How* v *Gray & al.* and *Luke* v *Lyde*, were decided. The owner, in the first case, provided another ship and completed the voyage, as to that part of the cargo saved by the wreck, and which the merchant agreed he should take on board, and for which he recovered full freight; and freight *pro rata*, only for that part which the merchant refused to put on board, and which the master suffered him to take into possession.

Freight *pro rata itineris* is never recovered but upon the ground of a new contract or benefit received by the merchant. In the case of *Leddard* v *Lopes*, 10 East. Rep. 526, Lord *Ellenborough* said, the case of *Luke* v *Lyde*, has often been pressed beyond its fair bearing. But the true sense of it has been explained by my brother *Lawrence*, in *Cook* v *Jennings*, 7 Term Rep. 281, and by my brother *Le Blanc*, in *Mullay* v *Barker*, 5 East Rep. 316. In the cases referred to, *Lawrence* says, "The owner is not entitled to freight *pro rata* unless under a new agreement." And he admits, that perhaps the receipt of the goods by the merchant, might be evidence of a new agreement between the parties. *Le Blanc* says "A recovery might be had upon an implied assumpsit, for a benefit already conferred on the merchant, which may be implied from his acceptance of the goods.

And he adds, "But here no benefit can be implied to the defendant from the plaintiff." And so I may say here. No benefit can be fairly implied to the defendants in this case. There is no evidence of their acceptance of any part of the cargo; nor indeed of their insurers having received any part thereof. In short, there is no evidence of what became of it, other than that it was sold under the direction of the master; and for aught that appears, the master or owner may have received the whole amount of sales, and may have, in virtue of his lien, paid himself. The owner's lien was not defeated by any thing set forth in this record; and in case he parted with it, by delivering the part of the cargo saved or the money produced by the sales thereof, to any person whatever, he ought to have recourse to such person and no other for his freight, if entitled to any. I feel confident in saying, that before freight *pro rata* in any case, can be recovered by any master or owner, it must appear that his lien has been defeated, either with his consent (which I admit implies a contract) or the public act of some government, as an embargo for instance, hostile in its character, divesting him of the possession of the goods; and in such case, perhaps, he might recover, although they did not come to the possession of the freighter or merchant.

But I cannot accord with the rule, that, because the merchant has received the full value of his goods from his insurers, that he is, on that account, liable to pay freight. Such a rule would subject the merchant, in every case where he had insured his property and met with a total loss, to the payment of freight. In every such case, he would abandon to the insurer, (for the word 'abandon,' I find, is used even where the loss is total,) and be entitled to the full amount of the value of his goods lost. But if such a rule should obtain, it would be at variance with the policy of the Maritime Law of all countries, as far as I have been informed; which goes not only to deprive the owner of freight, in such case, but, also, the hands of wages. It is to be feared, such a rule would introduce great negligence, both in the master and mariners, (for where there is freight there is wages,) which

it has always been the policy of all governments to obviate.

I understood the court, among other reasons for its opinion, to say, that the defendants had received full satisfaction from their insurers for the loss of their cargo, and therefore it was but reasonable that they should pay freight.

If I should still be in error, it will be a consolation to me, that my error will not alter the law in this case, nor work an injury. But as at present unprepared, I am obliged to say, that I think the plaintiff ought not to recover.

KELLY *vs.* GOODBREAD'S EX'S—Page 28.

After the testimony in a cause is closed, the introduction of other witnesses is a matter within the sound discretion of the court, and will be allowed or forbidden according to the nature of the action, the conduct of the parties, and the necessity of receiving further evidence for the advancement of justice.

This was an action on the case, tried before CAMERON, J. at Rutherford Superior Court, and founded on the act of Assembly passed in 1796, to prevent the removal of debtors; brought against the defendant's testator in his life-time,—for removing one R. Holford from Rutherford into Burke county,—he being indebted to the plaintiff. The plaintiff called four witnesses. They were sworn: and, at the request of the defendant's counsel, were sent out of court. The plaintiff's counsel examined three of them to prove that Holford was indebted to him by a note and on a judgment before a justice of the peace; and that the defendant's testator had removed Holford from Rutherford into Burke. No evidence was offered, on the part of the plaintiff, to prove that Holford had resided in Rutherford six months, or any other length of time, before the removal had taken place.

The defendant's counsel asked the plaintiff's counsel if they intended to offer any further evidence in the cause.

They replied that they should not offer any further testimony; and proposed submitting the case without argument. This was declined by the defendant's counsel; and having informed them that no evidence could be offered on the part of the defendant, requested that the plaintiff's counsel would open their cause to the jury. The plaintiff's counsel refused to make any remarks to the Jury; and desired the defendant's counsel to proceed in submitting such observations as they thought proper to make to the jury. The defendant's counsel then addressed the jury; and, after making some remarks on the plaintiff's evidence to prove the debt due by Holford to the plaintiff, and the removal of Holford by the defendant's testator, observed to the jury, that if both of these points should be in the plaintiff's favor, he could not recover under the evidence submitted to them by the plaintiff; because he had neither proved, or offered to prove, that Holford had resided in Rutherford county for six months, the time prescribed by the act on which the action is brought, before his removal, by the defendant's testator, from Rutherford into Burke.

The plaintiff's counsel, then interrupting the defendant's counsel, addressed the court, and stated that they could prove the fact of Holford's residence for six months in Rutherford before the removal into Burke, either by the remaining witnesses not in court, or by some other person who had not heard the trial; and prayed leave to offer such evidence. This was objected to by the defendant's counsel. The court refused the introduction of any further testimony in the cause.

The defendant's counsel having finished his remarks, the plaintiff's counsel then, by permission of the court, addressed the jury; and argued that they might well be satisfied that Holford had resided six months in Rutherford previous to his removal, from the date of the note and judgment, and from some other circumstances disclosed by the testimony. The court stated to the jury what a plaintiff, suing on the act in question, should prove, to entitle himself to recover; and left it to them to say whether the plaintiff in this action had

brought his case within the act in question. They found a verdict for the defendant. The plaintiff's counsel moved for a new trial, on the ground that they had a right to the benefit of the testimony which they wished to offer respecting Holford's residence before his removal; notwithstanding the time when, and the circumstances under which, they had offered it.

The court overruled the motion for a new trial; from which judgment, the plaintiff appealed to the Supreme Court.

The case was submited without argument.

PER CURIAM.

After the testimony in a cause is closed, no further evidence can be received, but by permission of the court. This permission will always be granted, or withheld, according to the nature of the action, the conduct of the parties, and the necessity of receiving further evidence for the advancement of justice.

The admission or rejection of testimony in such cases, must depend on the sound discretion of the presiding Judge.

We are all of opinion, that the additional evidence offered in this case on the part of the plaintiff, was properly rejected; and that the motion for a new trial be overruled.

NOTE.—*Parish* v *Fite*, 2 Murph. Rp. 258. See permission to re-examine a witness is matter of discretion with the court. *Barton* v *Morphis*, 4 Dev. Rep. 240.

DODD *vs.* HAMILTON AND HAMILTON—Page 31.

Larceny cannot be committed, unless the thing be taken against the will of the owner. Hence if the thing be sent by the owner for the purpose of entrapping the taker, it will not be larceny.

In an action for a *tort*, the court will not grant a new trial for excessive damages, ualess they are grossly extravagant, or unless there is just ground to believe that the jury have acted corruptly.

This cause was tried before CAMERON, J. at Rutherford Superior Court. It was an action of trespass, Assault and battery, and false imprisonment. Joseph Hamilton, a justice of the peace, came to the house of his brother, the other defendant, and sent for Nathaniel Pope. After he arrived, the two Hamiltons took a purse and put $12, together with two quarter-pound weights into it, and gave it to a female slave belonging to Noble Hamilton, one of the defendants. They directed her to go to a certain place on the river, not far distant. She went to the place; the defendant and Pope lying in ambush not far off. The plaintiff came to her a short time afterwards. As soon as he came up, a negro fellow, who was also in ambush, caught him, and called for the others; who came to his assistance. Joseph Hamilton arrived first; and the purse, with the money and weights in it, were on the ground. He picked it up, and struck the plaintiff with it, and injured him considerably. *Pope*, the witness, prevented Hamilton from any further abuse at that time. They then tied him and kept him in custody two days and nights; part of the time tied, and the balance of the time under guard. The magistrate, Joseph Hamilton, issued a warrant, and Pope executed it the morning after he was taken. They then proposed a compromise; and took a conveyance for his land and all his personal property; stated to be worth between one and two hundred pounds.

The plaintiff was poor; had a wife and a small family of children. While he was in custody, they threatened to

strip and whip him unless he would comply with their demands, by conveying his property to Noble Hamilton. Upon the conveyance being made, the warrant was destroyed and the plaintiff discharged. When Joseph Hamilton first came, he interrogated plaintiff as to his business. He said the servant owed him a small sum of money, which he had come to get.

The witness, Pope, who was deputed by the defendant, Joseph Hamilton, to act as a constable on this occasion, proposed to return the warrant before the said Joseph; but he refused to to take cognizance of it. Two justices of the peace lived within a short distance of the place where the plaintiff was held in custody; and one justice of the peace came to the place while he was so in custody; but the plaintiff was not carried before any justice of the peace.

The defendants were proved to be wealthy men. On the argument of the cause, the defendant's counsel argued in mitigation of damages, that the plaintiff was guilty of a felony, by receiving the money, &c. put into the bag by the defendants. In charging the jury, the court held, that it was essential to the commission of a felony, that the things taken, should be taken without the consent of the owner. But that if the plaintiff had been actually guilty of a felony, in receiving the money put into the bag, yet if the jury believed that they, the defendants, had exceeded and abused their authority, they were, nevertheless, liable to the plaintiff: and it was their exclusive province to assess adequate damages. The jury found for the plaintiff, and assessed his damages to £400.

The defendant's counsel moved for a new trial, on the ground that the damages were excessive; and that the court misdirected the jury, in stating that if the palintiff had received from the negro, the money put into the bag by the defendants, for the express purpose of being given to the plaintiff, that he was not guilty of a felony in receiving it. The court overruled the motion for a new trial. From which judgment the defendant appealed to the Supreme Court.

PER CURIAM.

A motion for a new trial is moved for on two grounds:

1st, Because the presiding Judge misdirected the jury in matter of Law.

2d, Because the jury gave excessive damages.

As to the first, we hold it to be a clear and indisputable rule of the criminal law, that it is essential to the commission of larceny, that the thing alleged to be taken, should appear to have been taken against the will of the owner. Had the plaintiff been found in the actual possession of the money put into the bag, for the purpose of being delivered to him by the defendant's slave, it would not have been felony; because the defendants, by their own acts, evidenced their assent to its passing into his possession. But if the plaintiff had been actually guilty of a a felony, in receiving the money, under the circumstances disclosed in the case; yet, by abusing the authority under which they acted, or pretended to act, the defendants became trespassers, and liable to to the plaintiff's action.

As to the second ground, we are of opinion, that the correcting power of the court, in cases of verdicts for damages, can only be rightfully exercised where the jury have grossly exceeded some standard pointed out by the law or justice of the case, by which their verdict should be regulated; or where there is just ground to believe that they have acted corruptly.

The application of these rules to the damages assessed by the jury in this case, will not warrant us in saying that they are excessive.

Wherefore, we are all of opinion, that the motion for a new trial be overruled, on both grounds, and that there be

Judgment for the plaintiff.

NOTE.—See upon the first point, *State* v *Jernagan*, post 44; and upon the second point, *Young* v *Hairston*, 3 Dev. Rep. 55.

HERRING *vs.* WIGGS—Page 34.

Where a deed conveys a specific number of acres, and no corner is named in the deed, parol evidence is not admissible to establish a line in contradiction to the deed, which shall contain less land than the specified quantity.

Where a deed purports to be governed by an old line, which is placed upon the records, parol evidence as to the intention of the parties, tending to control the deed, ought not to be received.

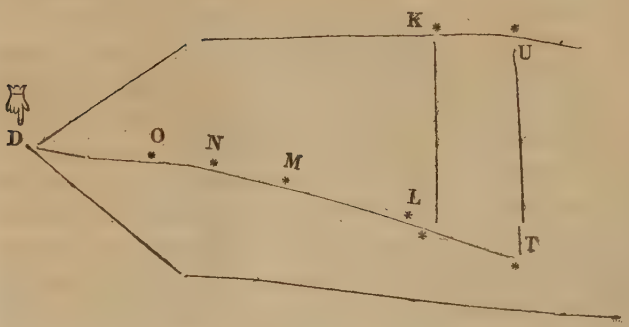
This was an action of trespass, tried before SEAWELL, J. at Wayne Superior Court. A verdict was rendered for the defendant, under the charge of the court. An appeal is taken to the Supreme Court, on a motion for a new trial, which was refused.

Michael Herring was the owner of a patent, covering the whole of the land in dispute. He conveyed to Keetley, under whom the defendant claims, by deed of the 6th of February, 1778, calling for its "beginning at a pine tree of Jacob Herring and George Graham's land, and running with George Graham's line, and the same course continued to a corner, including 100 acres of land running a North course to the patent line." This deed begins at the letter D, in the DIAGRAM hereunto annexed, and continues with Graham's line O, N, M, and to L. If the same course be continued to the letter T, and a North line to U, it will contain 100 acres. No marked trees are are found on the line, T, U, nor any marked corner at T. The plaintiff proposed to show, by parol evidence, that a marked line from L. to K was the true line of the Keetly deed. But the court charged the jury, that as no corner was actually named in the deed, no parol evidence was admissible to establish a line, in contradiction to the deed, which would give less than 100 acres.

Michael Herring had conveyed to the plaintiff, by deed of the 18th of May, 1805, which, after several lines, called for "Richard Keetley's corner, a pine, then with Keetley's line South 98 poles to a pine standing by the side of Grady Her-

ring's fence." The plaintiff proved, that at the time of this conveyance Michael Herring and his son Graddy Herring, to whom the deed was given actually run to K and thence to L, where there had stood the pine by Graddy Herring's fence. The son of Richard Keetley was present at this running, and made no claim beyond it. It was also proved, that Keetley sent his son to show his line; who had showed the line K L. The marked line K L is two years younger than the deed from Herring to Keetley, and some years older than the deed to plaintiff. The plaintiff proved a possession between the lines K L and T U for more than seven years after his deed from Michael Herring, and the defendant proved an agreement in 1803 between Keetley and Herring at the period of Herring's entering upon the land in dispute, to straighten each one's fence, and to occupy each a part of the lands of the other. Keetley died in 1806. The fences continued as fixed in 1803 until the present parties differed and this suit was brought; and the defendant insisted that Herring's possession was not adverse to Keetley's. The defendant also attempted to show a possession between the lines. One witness who did not speak with confidence, thought the corner pine at L, then a decayed stump, was within the defendant's fence. A witness for the plaintiff stated positively that the stump was without the defendant's fence. The court charged the jury, that the plaintiff had not shown a sufficient colour of title. That as Michael Herring, under whom the plaintiff claimed, had himself sold to Keetley, and the true line of the Keetly deed was T U, no sufficient evidence was given by the plaintiff to extend his line beyond that line.

DIAGRAM.



Gaston, for the plaintiff.

Badger, for the defendant.

By the court:

It has been very properly admited, in the argument of this case, that the deed under which the defendant claims, covers the lands in dispute. And the only point material, to be considered, is, whether the plaintiff's deed covers the same lands. If it do, he should then have been let in to prove his possession under it, and a new trial ought to be awarded.

The principles of the case of *Bradberry* v *Hooks*, decided at this Term, go the full length of deciding this cause. The deed to the plaintiff calls for a pine at Keetley's corner. This, the plaintiff contends, is at K, on the plat; the defendant, that it is at U. Now Keetley's corner is admitted to be at U, and *no pine appears* at K or U. But the deed, when at Keetley's corner, then calls for a pine *near Graddy Herring's* fence, which is stated to be at L; and therefore contends the Counsel, as the plaintiff proved on the trial, that when the grantor run the land, previously to making the deed to his son the plaintiff, the surveyor actually run the line from K to L; that, therefore, this deed, which was afterwards written, though not as founded upon a plat, then made by the surveyor, shall be understood as bounded ac-

cording to the running of the surveyor. And it is moreover insisted, that as Keetley himself recognized that as his own line, that therefore, it *shall* be so.

Now, it will hardly be contended, that the line running *from Keetley's* corner, can alter the location of such corner; and as to the other corner, a pine near Graddy Herring's fence, though the line is to run there, yet the grantor (who, it seems, was not acquainted with the boundary himself,) is cautious enough to say, that from Keetley's first corner called for, the line shall run to the pine near Graddy Herring's fence with Keetley's line. Keetley's line is in virtue of a prior ancient deed from the same grantor. The deed was upon record, and had that permanency to which it was entitled under the law; and though it contains a fixed quantity of land, yet as to the line in question, it did not profess to be bounded either by trees or even a *stake*, but was to be run in such way as to include quantity. Keetley's boundary, therefore, could not be mistaken, it could not be altered; and was not subject either to the recollection of "old men" or of common *report*; but would, at any length of time, speak the same language and have the same effect. When that is made the line by which the line between the plaintiff and defendant is to run, it must speak for itself. But with respect te the surveyor's running off the land before the father executed the deed to the son, it cannot possibly have any influence; for the question again recurs, what have the parties made the dividing line, by the deed, and do the deeds lap upon each other?

Then, as to the conduct of Keetley in recognizing the line contended for as his true line: If, in so doing, he was guilty of a fraud, and plaintiff was a purchaser, it would be good ground for going into a court of Equity to *compel* him to abide by it, but it could certainly pass no *title* to the plaintiff.

The danger of letting in evidence at to the *actual* intention of the parties to a deed for the purpose of controling it when it professes to be governed by a previously existing old line, and which line is placed upon the public record of

the country as well for purchasers as creditors, must be obvious to every one who believes either in the frailty or corruption of men.

Wherefore, we are all of opinion, the rule for a new trial should be discharged.

NOTE.—See *Bradberry* v *Hooks*, ante 1 and the cases referred to in the note.

WEST *vs.* DUBBERLY—Page 38.

Whatever may be the external formality of a deed, yet if its design be to defraud creditos it is void; and even without such present design, a deed of gift to a child, unattested by a supscribing witness, is void against creditors and purchasers by the act of 1784 (1 Rev. Stat. ch. 37 sec. 19.)

Detinue for a slave, named Ben. Plea, "general issue." The plaintiff claimed under an instrument of writing executed to her in 1795, by her father Thomas Cox; which instrument comprehended four other slaves and half a town lot. It purported to have been made in consideration of love and affection and of five pounds. It was unattested by any witness.

On the same day with the above deed, Thomas Cox also executed a similar one to his son Longfield, for several other slaves, and the other half of the lot; and the two deeds comprehended all the slaves and real estate which Thomas Cox then owned, and which formed the principal part of his fortune. The children were of the ages of eight and ten years. No delivery was proved.

Thomas, when he made these deeds, owned some horses, household furniture, &c. and was also indebted to several persons, but not to the amount of the property thus conveyed.

Afterwards, in 1797, Thomas sold the slave Ben to Lofton, and executed a bill of sale. The price given was £50,

though the slave was worth £200. The slave was seized in Loften's possession on an execution at the suit of Tignor, sold and purchased by Loften, after he had forbidden the sale, and made known the gift to the plaintiff, adding, that the purchaser would buy a law-suit. Loften however did not disclose the prior purchase made by himself.

Thomas Cox became greatly involved after the gifts to his children. All the property comprehended in them was seized by his various creditors and sold; and he himself took the benefit of the act for the relief of insolvent debtors. On the death of Loften, the slave in question was allotted to one of his daughters as part of her distributive share, and on her intermarriage with the defendant, came to his possession.

The case was submitted without argument.

SEAWELL, J. delivered the opinion of the court:

If the deed to the daughter was made with a *view* to defraud creditors, though clothed in the most solemn form, it would be void when opposed to such claimants; and if it made without such motive *actually* existing, yet if unattested by a *subscribing* witness, it is declared void by the act of 1784, which act our courts have construed to extend, only to creditors and purchasers. *Pearson* v *Fisher*, 1 Car Law Rep. 460; *Sherman* v *Russel*, 471, 2 Car. L. R. 431.

Loften, under whom the defendant claims, purchased first from the father, and afterwards at the sale of a creditor under an execution against the father. If the first purchase was *bona fide* and there is nothing to impeach it but *merely* the inadequacy of price, the deed to the daughter being a *gift*, and unattested by a subscribing witness, is, as to him, void; and the inadequacy of a price is a circumstnce from which, with *others*, fraud may be inferred, yet in *itself* it is insufficient. But if this purchase was *mala fide*, *Squire* v *Riggs*, 2 Car. Law Rep. 274, and with iniquitious intent, it would still leave the property, as it found it, liable to the claims of creditors, and the last purchase being made from a public officer, against whose conduct there is no imputation; the sale being to the highest bidder, where every person had an equal opportunity, though Loften's conduct at that sale

gives no grace to his claim, yet if the father then had a title which was answerable to his creditors, it necesssarily passed to Loften by such sale. We have not thought it necessary minutely to notice the circumstances under which the deed was executed to the daughter; but if it was, we should have no hesitation in pronouncing it fraudulent.

The father, at a time he is *much embarrassed*, conveys nearly the whole of his estate *absolutely* to his two infant children, who, from their tender years, are *incapable* of using it. A conduct so extraordinary, and unnecessary in *itself*, affords the strongest *evidence* of a fraudulent intention; and when coupled with a subsequent *sale* of the same property for a *valuable* consideration, or opposed to the claim of creditors, *conviction* follows.

Upon no ground, therefore, can the verdict be supported, but must be set aside and a nonsuit entered.

NOTE.—See the cases collected in the note to *Farrell* v *Perry*, 1 Hay. Rep. 2, and also the cases of *Peterson* v *Williamson*, 2 Dev. Rep. 326 and *Harris* v *Yarborough*, 4 Dev. Rep 166.

JONES *vs.* GIBSON—Page 41.

When the sheriff sell an entire tract of land for taxes on the whole, when no tax is due for one third part, the sale is void.

This was an action of ejectment to recover a tract of land containing 389 acres, part of a tract of 390 acres. A tax was claimed by the state on the tract of 390 acres, as unlisted land for the years 1802, 1803, and 1804; and on the 25th, November 1805, the Sheriff of Craven county exposed the same topublic sale and sold it to the plaintiff, who undertook to pay the said tax for 389 acres, part thereof. The 389 acres were surveyed duly by the County Surveyor, and the Sheriff made a conveyance of the same to the plaintiff.

On the trial, it appeared that a certain Samnel Hoover, claiming a right to one undivided third of the 390 acres, had, during the years 1802, 1803, and 1804, listed for taxes 130 acres as the one third thereof, and had paid the same before the aforesaid sale was had. The jury found a verdict for the defendant. If upon these facts the plaintiff is entitled to recover either the whole of the 389 acres, or any undivided part thereof, then the verdict is to be set aside; otherwise to stand.

SEAWELL, J. delivered the opinion of the court.

There is no analogy in principle between this case and those of a selling for taxes without due advertisement; in which cases, such sales have been held good. There, the officer did *no more* than he was authorized to do; here he has. He has in this case sold an entire tract, for taxes on the whole, when no tax was due for one third part. He has not been satisfied with this; but has sold for the raising of two years' taxes upon the whole, when by law, he had no right to sell at all, and which appears on the face of the deed. The purchaser, therefore, cannot show his title without exhibiting, on the face of it, an abuse of the authority under which the sheriff acted. But it is insisted, that so far as the sheriff *could* have sold, his sale ought to be effectuated;—and cases of powers derived from *contract* have been relied on. Now it may be a general rule, that in such cases the courts will sustain them where they have been executed in such way that the act which the agent had authority to do, was *properly* done, and was capable of being separated from that, which there was no authority to do. But how, in the present case, can such separation be made? The selling of the land was not in a proper manner; for the sum raised was three or four times as much as the officer had authority to demand. No one, therefore, can tell how much would have been required to raise the tax lawfully demandable. If this was a case of private agency, we therefore see no principle upon which a court could presume to collect an *intention* to execute a power; for the act done, and the effect

which results from an operation of the act, if it is to have any, are as essentially different from a proper exercise of the power as any two acts could be. In those cases of private powers, where the act has been done which the power authorized, though the agent may have done more,—and the authorized act has been done in *such way* that it may operate *consistently* with the authority,—if *innocent* persons are likely to suffer, the law has said, "That it will *intend* from the act and *its effect*, that the agent designed to execute his authority, but has only done so in a bungling manner." But we think, in the case of public officers, whose authority is not derived from any individual, that the law is clear, that wherever they transcend their authority, the whole act is void: That the law for them, nor for any one else, will presume they intended to act properly. Coke's Rep. 6, Carpenter's case. The Sheriff, therefore, being a public officer, and having exceeded the limits of his authority, the whole of his act is void, and, consequently, the plaintiff cannot recover.

The act of Assembly under which the sheriff sold, directs him to sell to the person who will pay the taxes and charges of advertisement for the smallest number of acres; and if no one will pay them for less than the whole tract, to execute a deed to the Governor, for the use of the State. And when they are sold to an individual, the same act requires, that the quantity purchased shall be separated from that not sold, by an *actual* survey made by the County Surveyor, and the sheriff is to execute a deed accordingly. From the state of the facts, it appears impossible that the present deed can prevail to its full extent; and by what rule or principle can its operation be directed? It cannot, in justice, be said that it shall be confined to the two thirds, excepting one acre, because it is impossible to say how much land it would have required to raise the tax legally demandable: and on this score it is repeated, that the purchaser, by his *own deed*, bears testimony against the justice as well as legality of his claim. But if the deed is to be confined to the two thirds, where is the excepted acre to be found? Not in the deed;

but must require something further to be done, either by the consent of the parties or the compulsory process of law. Such a result is clearly at variance with what the Legislature contemplated to follow, from the act *it* authorized the sheriff to do. Vid. Plowd. Com. Dive v. Manninghan. Wing. Max. regula 99.

HALL, J. and CAMERON, J. considered this case to come within the principle of those where a sale by a sheriff for taxes was held good, though the sheriff had omitted to advertise in the manner required by act of Assembly.

NOTE.—See acc. *Douglass* v *Short*, 3 Dev. Rep. 432. *Avery* v *Rose*, 4 Dev. Rep. 549. See also *Love* v *Gates*, 4 Dev. & Bat. Rep. 363. *Pentland* v *Stewart*, Ibid 386.

AT JANUARY TERM, 1817.

STATE *vs.* BARNA AND LOVET JERNAGAN—Page 44.

Larceny or seduction of a slave under the act of 1779 (1 Rev. Stat. ch. 34, sec. 10) cannot be committed in a slave, where the owner through his agent, consents to the taking and asportation; though such consent was given for the purpose of apprehending the felons. But where the defendants bring a slave to a particular place, after such assent of the owner, but in pursuance of a plan matured before the assent given, if the jury are satified that both defendants were privy to the felony and equally concerned, they may properly convict them.

Larceny may be committed in taking a runaway slave, knowing him to be runaway and to whom he belonged.

Whether a person convicted as an aider or abetter under the act of 1779 is entitled to the benefit of clergy Qu?

When the charge of the Judge is partly right and partly wrong, upon the law arising from the evidence, and it is impossible to say upon what part of the evidence the verdict is founded, a new trial will be granted.

This was an indictment against the prisoners under the act of 1779, c. 11, § 2, tried before DANIEL, J. at Wayne Superior Court. The indictment contained three counts. 1. Charging the defendants with having feloniously stolen,

taken and carried away, a male slave named Amos, the property of J. C. Pender, contrary to the act of assembly, &c. 2. Charging them with having feloniously seduced, taken and conveyed away the slave, with an intention to appropriate him to their own use, &c. 3. Charging them with having feloniously seduced, taken and conveyed away the slave, with an intention to sell and dispose of, contrary to the act, &c.

On the trial, the jury found a general verdict of guilty, against both the defendants: and a motion was made for a new trial, on two grounds.

1st. For misdirection of the judge in his charge to the jury. The evidence was as follows: Jeremiah Deans, who was the principal witness on behalf of the State, stated that he left Waynesborough on the 13th of March, 1816, to go to George Deans. When he got to Dr. Brownrigg's gate, in said town, he met Barna Jernagan, one of the defendants, who took him aside, and asked him when he was going to the State of South-Carolina (or to the southward) with negroes. Defendant informed Deans he had five or six negroes lying out, that did not belong to him, who wished to be carried away; and he wished Deans to assist him in conveying them away. Defendant asked Deans the consequence of doing this act? Deans informed him he did not know, but expected it would go hard with him. Deans then left him and went on, and informed George Deans of the conversation. On the 18th of March, he was coming to Waynesborough, and met the other defendant Lovet Jernagan, who informed him Barna wished to see him, and desired Deans to go to his house. Deans went to Barna's house, when Barna told him, three of the negroes were out. viz. Amos, his wife, and yougest child, and the other three he could get out at any time. Defendant Barna informed him the negroes were John Coor Pender's. Deans and Barna agreed to meet at a sale which was to take place at Dinkin's on the 20th of March. He met Barna at the sale, when Barna informed him three of the negroes were not out. They then agreed to meet at Waynesborough the 22d of March, when Barna

was to let him know when the negroes would be ready to start. On that day Barna did not come, but the other defendant, Lovet, came, and informed Deans that he was to go with Deans and the negroes to the south. Witness informed Lovet, that he must see Barna before he started, and sent word by Lovet that Barna must meet him at M'Kinne's mill. Barna met him, and then informed him all the negroes were out. They then agreed that the negroes were to be sold, and the money to be divided equally between Deans, Lovet, and Barna. He promised to deliver the negroes at a mill-stream of Mrs. Boon's, in the county of Johnston, on the night of the 24th of March, when Deans was to be ready to receive them, and, with Lovet, to take the negroes to the southward. Deans asked him for a bill of sale. He agreed to give one. Deans wrote it, and was requested by Barna to insert other than the true names of the negroes, as he expected they would be advertised. After the bill of sale was wrote, Barna refused to sign it, but said he would prepare one, and bring it with him when he delivered the negroes. Deans informed Pender of the whole transaction, who advised Deans to go on in the business. Deans and Pender had men placed at Smithfield bridge to apprehend the negroes and Lovet, one of the defendants. Deans went to the mill-stream on the night of the 24th, as agreed on. About ten o'clock at night, Barna and Lovet came to him, and informed him the negroes had taken a scare, expecting a trick, and would not go, unless Deans would assure them that they were really going to the southward, and he must go back with them along the road where they were. Deans then went back from three to five miles with defendants, to a place (which was proven to be in the county of Wayne, 12 or 15 miles from defendants' house) when Barna called "Bush." No answer was given. Barna then rode into the woods, and returned with the negro man Amos. He (Barna) and Amos again returned into the woods, and brought the woman and children. Barna put one of the children in the lap of Deans, and Amos, the negro man, put another behind Lovet, on his horse. Deans, Lovet, the negro Amos, and

the others, then proceeded on their intended route. After travelling all night, they were taken at daybreak, by the men placed at the bridge for that purpose.

It was proven, that the negro Amos was the property of Pender, and known to be such by defendant. The negro Amos had been run away from Pender upwards of nine months, and was out of the actual possession of Pender at the time aforementioned, but in the possession of no other.

The judge, in his charge to the jury, told them, if they believed the evidence, every material allegation in the indictment was sufficiently proven. He further told the jury, that if they were satisfied from the evidence that Lovet was present, aiding and censenting to the transaction, he was equally guilty with Barna, who was the active person; and it was his opinion, the agency Lovet took in the affair, from the time Amos was put into his and Dean's possession in the road, to the time they were taken at the bridge, he well knowing Amos to be the slave of Pender, and conveying him on with a view to sell to some person to the southward, was sufficient to convict him under the statute.

2dly. Because defendants were improperly refused a challenge for cause, made to one of the Jurors. Needham Whitfield was drawn as a juror, and examined as to his competency. He was asked whether he had formed an opinion as to the guilt or innocence of the defendants? He replied, he had formed an opinion. He was then asked if he had expressed that opinion? He replied, that he believed he had. He was then asked by the court, to whom he had expressed his opinion? He answered, that he could not recollect—but that he believed he had expressed it, but was not certain. He was then asked by the prisoner's counsel, where he staid the preceding night, and whether the case of the prisoners was not the subject of conversation, and whether he had then expressed his opinion? He answered, that he staid at Dr. Brownrigg's—that the case of the prisoners was there the subject of conversation, but that he did not recollect that he then expressed any opinion.

He was challenged by the prisoners for cause, and the challenge overruled by the court. Being tendered to the prisoners, they challenged him peremptorily. They made twenty eight peremptory challenges.

The motion for a new trial was overruled, and an appeal taken to this court.

The case was argued by *Browne* and *Mordecai*, for the prisoners, and *Drew*, Attorney-General, for the State.

Mordecai. There was not in this case a taking, 1st, because a runaway slave is not the subject of larceny, 2d, because he was not taken against the will of the owner.

1st. Property which is lost is not the subject of larceny, although the act may be attended with all those circumstances which usually prove a felonious taking. Hawk. 134, 135. 2 East 663. And this principle is so established, not because the act is less heinous, or the intention of the taker less base, but because the criminal law does not extend its protection to the property. The condition of this property was marked by every circumstance that leads to the conclusion of its being lost. It was not under the dominion of the owner; it was not in such a place as property of this description usually is; it was, in fine, as much beyond the owner's control or knowledge as a purse dropped in the highway. The slave had quit his master's service, and had not the *animum revertendi.*

This is admitted in the case of the *State* v *Davis*, 2 Car. L. R. 282. But from the decision there, it would seem, 1st, that a runaway slave cannot be said to be lost; 2d, that there is an exception to the rule, viz. that it only applies where the owner is unknown to the person taking the property. But certainly a slave may be lost as well as any other chattel; and with respect to the exception, none is made in the books which treat of this subject. Haw. 135, § 4. The case of a servant that took part of the money out of a purse, which his master had hid in a corn mow, and the other cases, proceed on the ground that the owner had *lost* his property. 2 East 664.

The reason given for the opinion, in *State* v *Davis*, that

felony cannot be committed in taking treasure trove, waifs, or estrays, "that the owner is unknown," is incorrect; for an indictment may charge the stealing of the property of a person unknown; therefore the knowledge of the taker cannot be the true test. Again: it is said in the case, "no property vesting in estrays before the expiration of a year from the time of appraisement. But the owner does not lose his title to the property by its straying, until seizure by a person having a right to seize. He has a right and may enforce it by a civil action, though the property is not protected by the criminal law. The case proceeds, "and in these it is always understood that the owner is unknown to the person taking them up." But the writers put it on a different footing. "Our law, which punishes all theft with death, if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil, than criminal offences, for this reason in the above-mentioned case concerning goods lost, because the party is not much aggrieved, where nothing is taken but what he had lost before." Haw. 135. When a horse is taken while grazing in his owner's or a neighbour's grounds, it is felony, because such is a usual situation for a horse. So if the slave had been found off his master's land, and had the *animum revertendi*, or, as the book says, where such property is, or ordinarily may be placed. 2 Eeast 664. But the negro was not in a place where negroes are ordinarily found.

2. To constitute larceny, the property must be taken *invito domino*. This results from the definition of larceny; 2 East 533, 655, and is proved by the case of *Re* v *M'Daniel & al.* Foster 121. The reason on which the court proceeded in that case, was not that Ellis and Kelly were not as guilty, in a moral point of view, as if Salmon, the person robbed, nad no hand in concerting the scheme; but it was because the goods were not taken against the will of Salmon. Now it is immaterial whether Pender assented to this scheme, to the end of punishing the defendants, or of promoting his own interest by getting, by these means, his property into his own possession. It is clear that he did assent.

The only difference between M'Daniel's case and the present, is this, that in that case, Blee engaged the persons to commit the act; in this case, the prisoners proposed it. But the property did not go into their possession against the will of the owner, more in one case than in the other. The remarks made on Norden's case, are strictly applicable to this. Foster 129. For here, Deans was active, and but for his agency, the act would never have been done; for the negroes refused to go till he returned.

Lastly. There was no carrying away; because Deans acted as the agent of Pender, who had he been present himself and received the property, there could have been no carrying away. He received it by his agent, and that is equivalent to a reception by himself. It would be repugnant to common sense, to make the act of *restoring* property to the owner's possession, the *carrying it away* out of his possession.

With respect to the prisoner Lovet, he did not seduce the slaves, but merely went to carry them off in company with Deans. The act of assembly does not extend to aiders and abettors; and if he was no more, he cannot be punished as a principal within the act. Foster 355. He certainly did not steal the property, for he did not take it out of Pender's possession; nor did it ever come into his possession, for the moment Barna adandoned it, it went into the possession of Deans, who had a right to receive it. But if he did steal it, a new trial should be awarded; for, as the conviction stands, he may be capitally punished, whereas if only convicted of the stealing charged in the first count, he would have his clergy.

Drew, Attorney General.

After the solemn decision of this court, in the case of the *State* v *Davis*, I had ceased to consider it as a disputable question, whether larceny could be committed in a runaway slave, when the taker knows him to be run away. It is supposed, however, that a course of incorrect reasoning, has led to an erroneous conclusion in that case; that postulates have been assumed, where propositions should have been

proved; exceptions made, which are not to be found in the books; and reasons given, not recognized by legal analogy. And if this be so, I admit that the decision ought to be revised, and the doctrine it maintains, repudiated. But if the opinion of the court in that case be examined, with due regard to the usual canon of legal criticism, according to the facts proved, and *secundum subjectam materiam*, it will be found to utter the language of reason, and to rest on the basis of sound legal principle. How the court would decide a case, which presented the abstract question, whether felony could be committed in stealing a runaway slave, I cannot pretend to determine; for assuredly it has not been decided in the *State* v *Davis*. A fact found by the jury in that case was, that *Davis knew* the slave to be run away, and whom he belonged to; and the court affirm the proposition, that, under such circumstances felony may be committed. Then, admitting for the present, that a runaway slave is lost, yet even in the case of goods lost, the finder, in order to defend himself, must in the language of the books, "really believe them to be lost, and cannot colour a felonious taking under such pretence." 2 East 664. Now, knowing that a slave is runaway, and knowing also whom he belongs to, negatives every presumption that he was taken up as lost property.

But with what propriety can a runaway slave be said to be lost? The prisoners' counsel has run a parallel of resemblances between them, but has omitted the points in which they differ. A slave commits a crime in leaving his master's service; and any free person taking possession of him *causa lucri*, is subject to the penalty of the law. Of no other chattel property that is lost, can this be predicated. A slave is a moral agent, who, yielding to the influence of fear or of hope, may be driven, or induced, to abandon the service of his master. Either of these passions might be worked upon, and roused into successful operation, by means so secret, as to defy proof and elude detection; and if the slave, being once run away, might be stolen with impunity,—a species of property, forming so large a proportion of the wealth of the State, would be more exposed to depredation than any

other kind. Facilities would be held out to the commission of crimes on a kind of property requiring, from its peculiar exposure, more of the repressive energy of the law, than any other that can be named.

It is said, that the reason given in the case of the *State* v *Davis*, why felony cannot be committed in taking treasure trove, waifs or estrays, because the owner is unknown, is incorrect. If the court have erred in this instance, they have done so in company with *Lord Coke*, who in giving the reasons why larceny cannot be committed in these things, says, "both in respect of the finding, and also for that *dominus rerum non apparet.*" 3 Inst. 107.

It is true that a person may be indicted for stealing goods where the owner is unknown; but he cannot be indicted for stealing *lost* goods, where the owner is unknown. Nor does the reason given by *Hawkins* why the law will not act criminally against the finder of goods, apply to the case of a runaway slave; for the owner is much aggrieved, when, after his slave is run away, the chance of regaining possession of him is lessened, and perhaps destroyed, by a felonious asportation. This part of the case may be concluded with a general remark: That whenever the principles of the criminal law are applied to a species of property unknown to the people for whose use that law was instituted, it is absolutely necessary to consider the reason and spirit of the law, and so to interpret and enforce it, that slaves may be as effectually protected as other chattels. I will not pursue this idea through any of its consequences, because they must occur to the court; but it is evident, that an adherence to the letter of the law, without regard to its spirit, would leave slave property wholly unprotected, as the common law knows no such property.

In answer to the defence arising from the slave being taken with the consent of Pender, through the agency of Deans, I will only cite *Egginton's* case. 2 East 666. If it be authority, it must govern this case, being expressly in point.

And as to Lovet, I cannot distinguish his case from that

of Barna; both are alike guilty, or alike innocent. Nor will the verdict against him deprive him of clergy, if by law he be entitled to the benefit of it; for the proper time to claim it, is after conviction. 5 Blac. 366.

Browne, in reply. I can add nothing to what Mr. *Mordecai* has said on the question, whether larceny can be committed on a runaway slave; but shall leave it on the strong ground where he has placed it. If this case is examined by the principles which certainly formed the common law, till the time of the Revolution, it will clearly appear that no larceny has been committed. In *M'Daniel's* case, decided in 1755, the defendants were acquitted, because Salmon's property was not taken from him against his will. Foster 121. And the principles there laid down, had been always respected before, and continued to be the undoubted law of *England* until *Egginton's* case, determined in 1801; for *Norden's* case is not at variance with that of *M'Daniel's*, because in the former there was a previous concert with the highwayman, that the robbery should be effected. *Egginton's* case is an innovation upon the law which can only be made by the Legislature: it was decided since our Revolution, and it met the disapprobation of Mr. Justice Lawrence. Hayw. 154.

2. But suppose that a felony might be committed, notwithstanding the situation of the property, and the assent of the owner, the prisoners not guilty of one, under this act of Assembly. In every accusation, it is incumbent on the State to prove the facts from which the law is to infer guilt; then, and not till then, is a prisoner bound to prove a justification or excuse. In murder, the homicide must be proved; and in larceny, the taking and asportation of another's goods: So on this act of Assembly, the stealing, or by violence, seduction, or any other means, taking or conveying away slaves, &c. such persons can only be convicted under this act of Assembly, as are proved to have committed the act, under all the circumstances and qualifications which are enumerated. Forter 355.

Several persons were indicted upon the 8th Eliz. c. 5, for

privately stealing a bank note from the person. It appeared in evidence, that the note was lost during a drunken scuffle, and it became impossible to ascertain which, if any, of the prisoners, had stolen it. The court said, the statute upon which this indictment is founded, takes away the benefit of clergy from those who shall be found guilty of privately stealing from the person; and as it is silent respecting aiders and abettors, it must be construed to extend only to principals in the first degree. It follows, therefore, that the hand alone which takes the property can be guilty of the offence; and as it is uncertain which of the prisoners took the note, it is impossible to find any of them guilty of the capital charge. Innis's case, Leach 9. So under this act of Assembly, those present, aiding and abeting, are not guilty: it can only be the hand that took or the tongue that seduced. From no part of the testimony can this be ascertained, nor any stronger inference made against Barna than that he was an aider and abettor.

There is still less pretence for considering Lovet a principal in the first degree, or guilty under the statute. He was not even an accessory *at* the fact, or a principal in the second degree, at Common Law. Blac. 34. 1 Hale 233. Foster 350. And on this point, his case was not submitted correctly to the jury; the words used by the Judge were, "present aiding and consenting," but the terms employed by the law are, "present, aiding and abetting." An abettor is an instigator or setter on. Jac. L. Dtc. Whereas *consenting* is a passive act of the mind, a yielding to persuasion, solicitation, or importunity. There is a plain difference between the guilt of being present at an act like this, and that of instigating another to commit it.

Taylor, C. J. I ought to distrust the correctness of the opinion I am about to deliver, when I perceive that it differs from that of all my brethren, in relation to the prisoner Lovet. But as I have examined with attention all the cases cited, and cannot see my way clearly, in any other direction, I feel it to be an indispensable duty to pronounce the best re-

sults my own understanding will enable me to arrive at. These are, 1st, that the evidence against Lovet was too slight and unsatisfactory to authorize his conviction; and that even in a common question of property, a verdict so found ought to have been set aside. 2. That if, upon any view of the testimony, the verdict against Lovet can be sustained, he is nevertheless entitled, under a fair construction of the act under which he is indicted, to the benefit of clergy. I will give the reasons which have led me to these two conclusions, and will afterwards speak to some minor points in the case.

1. The natural division of the testimony is, into those circumstances which took place before Pender had been made acquainted with the transaction, and consented to it; and those which occurred afterwards. If nothing but the latter class had been proved against either of the prisoners, I think they ought both to have been acquitted, on account of the assent of Pender; and I take this opportunity of expressing my entire concurrence with the doctrine laid down in M'Daniel's case. Foster 121. These latter circumstances can only affect the prisoners by way of evidence, so far as they can be connected with proofs of guilt existing before Pender's consent was given; and I agree, if any thing be proved before that time, which implicates Lovet in the crime of stealing or seduction, his subsequent conduct of carrying the slaves to Smithfield bridge, may properly be connected with such proof. But beyond this point, I do not feel justified in proceeding. If Lovet was not a guilty man before Pender consented to the larceny, I cannot agree that he shall be considered so afterwards.

In considering the testimony, I cautiously abstain from drawing any inferences from the facts stated—that is the province of a jury. I take them nakedly as they are exhibited in the record, which is drawn up with much care.

The first of the Defendants who appears is Barna, who told Deans that he had the negroes lying out, and expressed a wish that Deans would assist him in carrying them away. Five days afterwards, Deans met Lovet, who merely de-

livered a message to Deans, that Barna wished to see him.

Lovet did not say that *he* had negroes lying out, or that *he* knew they were lying out, or that he wanted assistance to carry them to the southward. He did not, in short, utter a single word about negroes.

When, in consequence of this message, Deans went to Barna's house, whom did he see there? Not Lovet, but Barna, who informed him that three of the negroes were out, and the rest he could get out at any time. Upon this occasion, Barna agreed to meet the witness at a sale; and when afterwards they met there, Barna informed him that three of the negroes were not out, but he would let him know when they would be ready to start, if he would meet him at Waynesborough on the 22d. Barna did not attend at the day; but Lovet appeared, and for the first time, spoke with Deans about the negroes; but did not, in my opinion, say any thing which can justly fasten upon him the guilt of stealing, of seduction, or even a knowledge of either. "He was to go with Deans and the negroes to the south;" but whether he was about to do right or wrong, whether Barna acquired the negroes feloniously or otherwise, it does not appear that he knew. At this time, Deans sent a message by Lovet to Barna, that the latter must meet him at M'Kinne's mill. But Deans did not charge Lovet to accompany Barna, nor did he hold with him that sort of free communication and disclosure, that confidential intercourse, which would seem to be natural, in a case where Deans believed that Lovet had been privy to the felony, or aided in it. He did not, in short, unbosom himself to him further, than he might safely do to a man who was employed to carry negroes to the southward, without knowing whether the possession was fair or fraudulent.

But the case states that they met at the mill. I ask did Lovet meet? He was not requested to do so by Deans, who expressly said, he (Barna) must meet *me* (not us) at M'Kinne's mill. Barna met him (not them) and then they agreed that the negroes were to be sold and divided between the

three; and that they were to be delivered at a mill-stream of Mrs. Boon's, on the 24th of March, when Deans was to receive them, and with Lovet, to convey them to the southward.

No construction of this part of the case, will warrant the conclusion that Lovet was present at this meeting, or any party to the agreement, relative to the sale af the negroes and the division of the money. If I have read the record aright, it states that the defendant, in the singular number, knew the negroes to be Pender's. Which of the defendants, or at what time he knew it, whether before Pender's assent, or afterwards, it does not specify.

After this period, the assent of Pender was given; and as in my opinion, all the testimony against Lovet before that time, is, without straining or refinement, susceptible of a construction which leaves his guilt unproved, it ought to receive it.

2. The prisoner is indicted under the act of 1779, c. 7, which makes it a capital felony to steal a slave; and the enquiry I shall now make, is, whether, upon the supposition that Lovet was present, aiding and abetting Barna, but not having actually stolen the slave himself, he shall be entitled to the benefit of clergy.

In a question of so much delicacy and importance, connected with the criminal law of the country, and with that part of it too which denounces the punishment of death, I know that a Judge should take every step with the utmost caution, and advance no principle which he is unable to produce the best authorities in support of; for as his province is *jus dicere et non dare*, it is only by an inflexible adherence to what the law has declared, and by reasoning from well established principles, that he can contribute to that harmonious movement of the different powers of Government, which forms the essence of civil liberty.

In the correctness of the principles which I shall lay down, I have the utmost confidence, because they are derived from the most authoritative sources; my reasoning from them may be erroneous, and on this point I cannot competently judge.

1. That where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also included in the words of the statute. 2 Hawk P. C. 342.

2. That where it is only taken away from the person committing the offence, as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person, his aiders and abettors are not excluded. 1 Hale P. C. 329. Foster 356.

3. But when the benefit of clergy is taken away from the *offence* (as in case of murder, buggery, robbery, rape and burglary) a principal in the second degree, being present, aiding and abetting the crime, is as well excluded from the clergy, as he that is principal in the first degree.

The two first principles will, I think, be found to apply to the case under consideration, and to furnish the rule by which it ought to be decided. I have cited the last for the purpose of shewing, that the act of Assembly under which the prisoners are indicted, extends only to the persons committing the offence, and not to the offence itself.

Persons who are present at the commission of a felony, and aid and abet the principal felon, are, at common law, punishable in the same manner with the principal, because they are considered principals in the second degree. But they were formerly considered in the light of accessories; a notion which gradually yielded to considerations of the justice and propriety of bringing them to trial while the fact was recent and susceptible of proof, instead of waiting for the conviction of the principal. They are therefore considered as principals for many purposes, and especially for all the purposes of punishment, by the common law.

But when statutes began to be passed creating new felonies, or aggravating the punishment of felonies then existing, Judges were called upon to pause and reflect, by the rule of law which demands a strict construction of penal statutes. The question was directly put to them, Shall he be condemned to death, whose offence is not specifically described in

the act; and who is only a principal by a sort of legal fiction, invented for the furtherance of justice, and adopted without any foresight, that the name given to, and the character vested in him, would subject him to a severer punishment by any law thereafter to be passed?

Let us see how they answer this question in the first case that occurred. The statute of Eliz. 39, c. 15, enacts that clergy shall not be allowed to any that feloniously takes away any thing in the day-time amounting to the value of 5s. out of any dwelling-house, or out-house, albeit no person be within or near the same. Evans and Finch were indicted under this statute, and it appeared in evidence that Evans, by a ladder, climbed to the upper part of the window and took out the money; and that Finch stood upon the ladder, in view of Evans, and saw him enter into the chamber, and was assisting and helping him in the robbery, and took part of the money. It was adjudged that Finch should have his clergy, because it was taken away only from the person offending, and not from the offence. Cro. Car. 473.

If in that case Finch had been indicted at common law, he would have been considered a principal in the second degree, and punished in the same manner with Evans; but because the statute did not particularly describe the the part he took in the felony, he was entitled to clergy. The statute speaks of a stealing in the house, therefore he that stealeth, or is a party to the stealing, being out of the house, is not ousted of clergy. 1 Hale 427. It is equally clear, that in the construction of law, the entry of Evans was the entry of Finch; but because the court were giving a construction to a statute highly penal, they would give it no other than a strict and literal one. Aiders and abettors were neither named nor described in it, and therefore they should not be punished under it.

The construction which has been put upon the statutes of stabbing, is much in point to establish the same doctrine. Wherever persons are present, aiding and abetting him who makes the thrust, they shall be entitled to clergy; although

if indicted for manslaughter at common law, they would have been principals in it.

All the reasons given in support of these decisions, do, in my opinion, apply with the utmost precision, to the act of assembly under which these prisoners are indicted. "Any person or persons who shall hereafter steal, or shall, by violence, seduction, or any other means, take," &c. It does not describe the offence of an aider or abettor, any more than the statutes of Elizabeth, or those of stabbing; it is as penal as any other law, and describes an offence part of which was felony at common law; it takes away the benefit of clergy from the *offender*, and not from the *offence*, and bears a near resemblance to the statute on which Innis was indicted. Leech. 9. For that was made to punish stealing in a particular manner, viz. *privately from the person*, and it takes away clergy from those who are *found guilty* of the offence. So the act of Assembly under consideration, designed not merely to increase the punishment of stealing a slave, which was a felony at common law, but it extended beyond this, and punished with death other modes of taking away slaves, which, in my opinion, were not felonies at common law; for a taking by violence, does not necessarily imply a felonious taking, unless it be violence to the person of the owner: Nor would taking a slave upon a claim of right, amount to felony; for if there was any fair pretence of property in the prisoner, or it be brought into doubt at all, the court will direct an acquittal. 2 East 659.

The occasion of passing this act of Assembly, is mentioned by an eminent Judge, who was in active life at that period, and it appears from thence, that it was intended to repress a variety of new modes of taking slaves, which had grown out of the turbulence of the times, "under pretence that they belonged to the public as confiscated, or that they were owned by disaffected persons or the like." State v Hall, 1799. From these considerations, I think it appears, without any strained inference or forced construction, that part of the object of the act of Assembly, was to take away clergy from larcenies of slaves, under particular cir-

cumstances; and if so, it comes within the reason of all the cases where clergy has been allowed to aiders and abettors, when not named in a penal statute. 2 East 743.

3. On the last position I have laid down, it is unnecessary to make many remarks, because if any thing is proved by what I have before said, it is, that the act of Assembly does not take away clergy from the offence, but from the offender. The statutes which oust clergy in murder, robbery, &c. have received a different construction, because the Legislature made use of terms, which at the time of making the acts and long before, were well known to include aiders and abettors. The offences called *murder*, *robbery*, *burglary*, &c. are technically so described, and aiders and abettors were liable, when the statutes were passed, to be convicted as principals in them. but taking a slave by "violence, seduction, or any other means," &c. was not a technical description of any offence known before the passing of the act; and, therefore, he alone who takes or seduces, not he who aids and abets, is liable to the punishment of death under it. The charge of the judge has been objected to, because it used the words present, aiding, and *consenting*; and it has been intimated, that the Jury might have been misled by that circumstance. I do not think the charge exceptionable in that respect; though I admit it is always most safe to employ the established terms of the law, to which the wisdom of ages has given sanction, and usage a popular and explicit meaning. We are not, however, to be governed by the sound of words, but by their true legal import. In drawing indictments upon penal statutes, in which the law particularly requires strictness, it is not essential to follow the very words of the statute, provided words of equivalent import are used. To consent, signifies "to co-operate to the same end," Johns. Dict. and a person who does so, and is also present and aiding, could not well be injured by the language used by the judge. Lord Coke, in commenting on the statute West. 1, in explaining the words *commandment* and *aid*, as applied to accessories before the fact, says, "under this word *command*, are understood all those who incite, procure, set on, or stir up

any other to do the facts; and under the word *aid*, are comprehended all persons counselling, abetting, plotting, assenting, *consenting*, and encouraging to do the act, and not present when the act is done." So that a person who *consents*, though not present, is an aider: "for, if the person be present when the act is done, then he is a principal." Lord *Hale* says, misprision of felony is the concealment of a felony which a man knows but never consented to; for if he *consented*, he is either principal or accessory. These authorities show, that persons *consenting*, procuring, or contriving, come within the words, aid and command; and to command is not less strong than to abet.

SEAWELL, J. This case comes up upon a motion for a new trial, grounded upon a supposed misdirection of the presiding Judge; who stated to the jury, that if they believed the facts to have been as related by the witness Deans, the prisoners were both guilty of the charges specified in the indictment; and that the judge directed the jury, that the agency which Lovet took in assisting Deans after his receiving the slave, in carrying them to *Smithfield*, was such an *aiding*, *abetting*, and *consenting*, as made him principal and *equally* guilty with Barna. And it has been insisted, for the prisoners, that the *receiving* of the slaves and carrying them to *Smithfield* by Deans, being by the consent of the owner; and the agency in *that respect* by Lovet, being by the consent of Deans, who is to be considered as the agent of the owner; that nothing which Lovet did in that particular, can be said to be done *invito domini*, and consequently can amount to neither larceny or seduction. And I think so too; and in that respect, differ from the presiding Judge. But to me it is *clear*, that as it appears that *both* the persons brought the slave to the same place where he and the others were delivered; and *that* being in execution of a plan *completely* matured, *without* the knowledge of the owner; and to which plan both persons were *equally* privy, and in the performance of which they appear to have been *joint* actors; that all the circumstances taken together, they constitute a complete seduction and larceny: and if the jury *did* believe

them, they were well warranted in finding both defendants guilty. Had the charge of the judge, therefore been *confined* to this part of the transaction, I should have been well satisfied with *it*, and the verdict also; but as it is impossible for *me* to say, whether the jury found Lovet guilty upon *this* part of the evidence, or upon that which related to his conduct *after* the delivery to Deans, I am constrained, though reluctantly, to say, that, on that account, and *that* only, the verdict as to Lovet, must be set aside, aad a new trial granted.

I cannot, therefore, subscribe to the opinion of the CHIEF JUSTICE, who holds, that the finding as to Barna was right, but that Lovet, on account of the part he acted after the delivery to Deans, was aiding, abetting, and consenting, and should, therefore, have been found guilty as a principal in the second degree; for I understand the case expressly finds, that both the prisoners knew the slaves to be runaway and to belong to Pender: and it appears also, that Lovet was privy to the plan, for he informed Deans, he was to go with him, with the slaves; and though Lovet was not at M'Kinne's mill where the project was finally completed, yet he was the messenger by whom Barna was requested to attend; and at the time and place the slaves were to be delivered, Lovet there appears equally engaged with Barna; and the excuse they allege for not being able to get the slaves further, makes it impossible, to my view, that Lovet, so far, *may* be considered as an *honest agent*. On the other hand, I am incapable of discovering any difference between the *agency* of the prisoners in this part of the transaction. It may be, and is probably so, that Lovet being (as I understand) the youngest brother, was stimulated and *induced* to act by the means or advice of Barna; but that he did act, and equally participated with Barna, in both the larceny and the seduction, I cannot doubt about. And if Lovet's conduct is to be considered in the light of an honest agent *previous* to the delivery made to Deans, there does not appear a particle of evidence to criminate him afterwards; for, in no part of the case does it appear that he was at any time informed of the mistake he was under: this view of the case therefore would

lead to the entire acquittal of Lovet, and ought, as I conceive, with the same force, to acquit Barna. It is not necessary for me to express any opinion upon the question raised in argument, whether principals in the second degree be ousted or not of clergy, as my opinion for a new trial is founded on a different reason; but if it was, I am very far from being *satisfied* that such principal is not ousted by the act of Assembly in this case. The rule laid down by law writers, admits of a distinction between cases where clergy is taken away from the *offence* and where from *offenders* under *particular* circumstances. The act declares, "That if any person shall hereafter steal, or shall by violence, seduction, or any other means take, or convey away any slave or slaves, the property of another, with intention to sell or dispose of to another, or appropriate to their own use such slave or slaves, and being thereof lawfully *convicted* &c. shall be adjudged guilty of felony and suffer death without benefit of clergy." Now a slave being goods and chattels, was at all times capable of being the subject of larceny, and the Legislature having ousted those who should be *convicted* thereof *generally*, and not confining it to a particular kind, or a larceny of a slave under particular circumstances, it would therefore seem to extend to all those who, in judgment of *Law*, make *principals*, whether of the first or second degree. And it is this distinction which distinguishes murder and rape and the privately stealing from the *person*, for in the latter case, the statute only ousts the clergy when the stealing was of a particular kind or under particular circumstances; so in the case of *stabbing*; so in the case of robbery *in* dwelling houses; in all which instances, the Legislature having only taken away clergy against those who should be guilty of the offence under those circumstances, it extends to no others; and in the case of *new* felonies, the same rule must necessarily apply. Foster's Cro. Law 355—6. But in the cases of murder, rape, robbery, and burglary, the statute of Edw. 6, declares, "that no person that hath been or shall be *convicted* of *murder* of malice prepense, or of robbing any one in or near the highway, shall be admitted to have his clergy;" and

the statute of Elizabeth declares, that if any person shall be *found guilty* of rape, he shall suffer death without benefit of clergy; yet in all these cases, the courts have uniformly held, that persons, "*convicted*" of murder or robbery near the highway &c. or persons "*found guilty*" of rape, whether principals of the first or second degree, were ousted. Fost. Cro. L. 357. Our act of Assembly has not selected any particular kind of stealing of slaves, for the words, "with intention to sell, or dispose of to another, or appropriate to their own use," if they necessarily do relate to the word steal, are only such circumstances as must appear in every larceny, namely, *causa lucri*: and like laying murder with malice prepense as the statute of Edward; for in the hypothetical case put at the bar, of a taking and carrying with intent to liberate, if such was the motive of taking, I should have no difficulty in saying it was no felony, any more than if one individual throws his neighbor's property in a pit, or in any other manner destroys it. Such cases might be trespasses, or what in modern times have acquired the denomination of malicious mischief, but they are not felonious. The result, therefore, seems to me this, that as to so much of the act as relates to a stealing of slaves, the oustings of the clergy is general or in other words, applies to the offence, which then will include principals of every denomination, who before the passing of the act were liable to be convicted as such; and that it has not confined the exemption of clergy to offenders of a *particular class*. These are but my *impressions*, occasioned more by *general* reading than from any particular examination of this case; and such as were hinted to the counsel in the course of the argument. As to Barna, I see no reason for disturbing the verdict in relation to him; and in respect to the objection that the slave was a runaway, that point was expressly determined in the case of the *State* v *Davis*, in this court, and I am well satisfied with the decision; as to what relates to all the other objections, I think they are altogether insufficient, and that the rule must be discharged.

Judges HALL and RUFFIN concurred in this opinion; DANIEL J. having presided, and LOWRIE, J. absent.

NOTE.—Upon the first point, see *State* v *Hardin*, 2 Dev. & Bat. Rep. 407. See also *Dodd* v *Hamilton*, ante 31. Upon the question of stealing a runaway slave, see *State* v *Davis*, 2 Car. L. Repos. 291.

RICHARDSON *vs.* SALTAR AND OTHERS—Page 68.

Where the county court does not form rules and regulations for patrollers, under the act of 1802 ch. 15, they must conform to those of 1794 ch. 4; and under that act *one* patroller has not a right to inflict a punishment by himself, and if private persons aid and abet him, though called upon by him to do so, they, as well as he, are all trespassers.

This was an action of *Trespass vi et armis*, tried before LOWRIE, J. at Bladen Superior Court. The defendants jointly, not guilty, justification, &c. The jury found a verdict of not guilty, as to all; and upon motion by the plaintiff for a new trial, it was overruled by the court, and an appeal taken to this court.

The material circumstances of the case were, that the defendant, Saltar, who was a regular Patrol, associated with him the other defendants, Allen, Bryan and Singletary, who were not patrols, and went to the plantation of Major Owen, where they found in an outhouse, the negro Simon, whom they called upon for a pass, which he produced, written in these words: Pass Simon, or let Simon pass till Monday morning." It was in the hand writing of the plaintiff's wife, but in his name. Saltar told the negro the pass was not a proper one, and ordered him to strip, on which he attempted to escape, and Allen, who stood in the door caught him which enabled Saltar to seize and throw him. But Saltar alone was not strong enough to hold him down, und calling for aid, Allen and Singletary struck him, and at length, their united efforts and blows, with a stick and with their fists, subdued the negro, and he was whipped.

A physician proved, that the temporal artery was divided, and that the negro was much weakened by the loss of blood, from the effect of which he could not probably recover in less than three or four weeks; but the wound was not so serious as to do any permanent injury. It appeared, however, on the part of the defendants, that the negro was engaged in some business in Smithery, within a few days after he was whipped. The only proof against Bryan was, his having gone to the plantation of Owen with Saltar.

The Judge instructed the Jury that the pass was not a proper one; or at least was not sufficient to preclude Saltar from examining the negro, or from using such force as was necessary to compel him to submit to an examination; and that Saltar had a right to command the assistance of the other defendants for that purpose. Still however, if any of them transcended the necessary limits, and wantonly beat the slave, they became trespassers *ab initio*.

Henry, for the defendants. The application for a new trial, being to the discretion of the court, they will not award one, where the injury done is of a slight and trivial nature. Supposing the defendants to be guilty, very small damages would compensate the plaintiff, who lost the services of the slave only for a few days. 5 Johns. 137, 6 Johns. 270. 1 Taun. 495.

2. But Bryan is wholly innocent, and has been properly acquitted: He ought not again to be put in jeopardy; and a new trial must be granted or refused as to all the defendants. Where trespass is brought against two defendants, one of whom is found guilty, and the other is acquitted, a new trial cannot be granted on the motion of the convicted defendant. Buller 326. 8 Salk 362. 12 Mort. 275. 2 Str. 814. 1 Wash. 322.

Daniel, J. By the act of 1794, c. 4, the county courts are authorized to appoint in each Captain's district, a number not exceeding six discreet and proper persons, to be Patrollers. The act of c. 15, gives the county courts power to appoint, in such manner and in such numbers as they please, and to form rules and regulations for them, &c. and they

are to have the same powers and authorities as they had under the act of 1794. The act of 1794 is not repealed but enlarged by that of 1804. It does not appear from the case, that the county court of Bladen made any rules and regulations under the authority of the last act; therefore the Patrollers of that county were regulated by the law as it is laid down in the act of 1794. That act says, "it shall be the duty of the Patrollers, *or two of them at least*, appointed as aforesaid, to patrol their respective districts, once at least in two weeks." The 5th section states, that the Patrollers in each district, or a majority *of those present*, shall have power to inflict a punishment, &c. I am therefore of opinion, from a full and fair examination of the two acts, that the defendant, Saltar, had not the right to exercise the powers of a Patroller by himself, and as the other defendants were present, aiding and abetting him in an unlawful act, they were all guilty of a trespass.

New trial granted.

NOTE.—For the appointment and regulation of the patrol as it now exists, see 1 Rev. Stat. ch. 86.

BROWER *vs.* WOOTEN—Page 70.

Notice to an endorser of the non-payment of a note should be given by the holder or by some person authorised by him. It should also intimate to the endorser that he is looked to for the payment of the money.

This action was brought against the defendant, as endorser of a note made by Landsdale, and payable in January, 1814, but by the endorsement made payable in October of the same year. The plaintiff, in due time, warranted the maker, obtained judgment and execution, on which there was a return of "no property to be found." The constable then who acted for the plaintiff to collect money, both as an officer and friend, told the defendant he should have to come

on him for the money; but said, he was not authorised to do so as the agent of the plaintiff, who lived at a distance. The plaintiff warranted the defendant without further notice, and the cause came up to Bladen Superior Court, by appeal, where it was tried before HALL, J. who instructed the Jury in favour of the defendant; but they found contrary to his charge.

Upon a motion for a new trial, the case was referred to this court, upon the question, whether if the verdict be against law, yet as the finding is consistent with the equity of the case, ought a new trial to be granted?

Henry, for the defendant. It is well settled, that notice of the failure of the drawer must be given by the holder himself or his agent: It is not sufficient that the endorser should be informed of it by some third person. *Tinsdale* v *Brown*, 1 T. Rep. 171. Neither will the insolvency of the maker excuse the endorser from a strict compliance with the rule. 2 Hayw. 48. 2 Caine's 343. 2 H. Bl. 609, 15 East.

It may safely be argued that the justice of the case too is with the defendant, for where one of two innocent persons must suffer, the loss ought to fall upon him who occasioned it. But whenever a verdict is given against the known rules of law, a new trial will be granted. 1 Term Rep. 171. Johns. Cases 336. 3 Johns. Rep. 180. 4 Burrows 2188. 1 Bay's Rep. 269. 2 Bay's Rep. 23.

TAYLOR C. J. An endorser undertakes to pay a note only in the event of the maker's not paying it, and, therefore, when the endorser receives the note he undertakes to apply to the maker; and if, after it becomes payable, he is guilty of neglect, and the maker becomes insolvent, he loses his recourse against the endorser. Notice is necessary to the endorser, because he is liable only in a secondary degree, and after every thing has been done by the endorser which he engaged to do. It is not, therefore, enough that the endorser should be apprised of the default of the maker, but he should be distinctly notified that the holder looked to him for payment: for notice of non-payment might be accompa-

nied with circumstances, showing that the endorser had, by his neglect, discharged the endorser. The notice in this case was of no more effect than if it had been given by a third person, because the constable was not authorised to give it. The insolvency of the maker creates no difference, and the law of the case forms its justice, where the reciprocal engagement of parties stipulates that something is to be done before a right of recovery can exist.

New trial.

NOTE.—See *Pons* v *Kelly*, 2 Hay. Rep. 45, and the note thereto.

SMITH *vs.* McLEAN—Page 72.

A person endorsing a note for the accommodation of the maker, is entitled to notice of non-payment.

Where a note is made payable at a particular bank, it must be presented there, when it falls due, otherwise the endorser is discharged; and that even although the maker of the note dispenses with such notice.

If the attorney employed by the owner of a note to sue on it, strike out an endorsement, it discharges the endorser.

David Anderson was indebted to Dockery Smith & Company, in the sum of one thousand nine hundred and thirty dollars. They agreed to indulge him six months, provided he would give a note, with the defendant as an endorser, to secure the payment of the debt; whereupon a note was drawn, and executed by Anderson, as follows:

$ 1930 "Fayetteville, N. C. 9th Nov. 1811.

"Six months after date, I promise to pay Mr. Hugh M'Lean, or order, one thousand, nine hundred and thirty dollars, for value received, payable at the State Bank.

D. ANDERSON."

This note, on the same 9th of November, was endorsed by Hugh M'Lean, the defendant, in blank, to the plaintiff and his partner.

On the day the note became due, it was presented by plaintiff's agent to Anderson at Fayetteville, and payment demanded: To which Anderson replied, he could not then pay it, but expected to do so in a few days; that it was unnecessary to present it at any of the banks, as he had no funds there to discharge it. And it was proved, that when the note became due, there were no funds of Anderson's at any of the banks.

It was proved that M'Lean endorsed the note without any consideration, except for the accommodation, or as security of Anderson, as aforesaid. It further appeared in evidence, that in August next after the note became due, Anderson mortgaged property to secure a debt due the Cape Fear Bank, to the amount of $4,525; and in the following month, his property to the amount of $2,000, was sold by execution; and it was not proved that he was insolvent until months after the note became due. The plaintiff's agent was at defendant's house in July or August next after the note became due, but gave no notice of its non-payment; but in February or March following, defendant received notice, when he expressed great astonishment, and urged the plaintiff's agent to obtain the money, if possible, from Anderson, saying, if he (M'Lean) had it to pay, it would ruin him.

In August, 1812, the note in question was placed by plaintiff's agent in the hands of an attorney, without further instructions than to institute suit against Anderson.

The Attorney supposing the property of the note to be in the agent, brought the suit in the name of Hugh M'Lean, to the agent's use, against David Anderson; and on the trial, without any authority or directions from the present plaintiff, or his agent, erased the name of Hugh M'Lean endorsed on the note.

The jury found all the issues in favor of the defendant. A motion was made for a new trial, which the court refused, and the plaintiff appealed to the Supreme Court.

The questions submitted to the Supreme Court, are

1. Does such an erasure as is mentioned in this case, discharge an endorser, otherwise liable?

2. Is the endorser of a note, who signs it to accommodate the maker, or his security, in the manner stated in this case, entitled to notice of its non-payment?

3. If such notice be necessary, did not the subsequent conversation of defendant with plaintiff's agent, amount to a waiver of such notice? Or was the notice in February or March, sufficient?

M'Millan for the plaintiff. The striking out the name of the endorser by the attorney, does not discharge him. 15 East. 17. As to notice, it is generally true that the endorser ought to have it, where there is a default of the maker; but that is only necessary where he might sustain a loss from the want of it. Where the endorser has no effects in the maker's hands, no notice is necessary. 1 Esp. Rep. 302. 2 H. Bl. 336. 1 Term Rep. 405.

RUFFIN, J. The counsel for the plaintiff has insisted, that as the note was endorsed by the defendant without any valuable consideration, and merely for the *accommodation* of Anderson, the maker, and to give Anderson credit with the plaintiff, who received the note with knowledge that it had been endorsed with such intent, there was no necessity for notice of non-payment to be given to the defendant. I am of a different opinion. Whatever may be the rule with respect to bills of exchange, where the drawer has no effects in the hands of the drawee, I think, that in this respect, the law with regard to *promissory notes*, is otherwise. The difference arises from the forms of the undertakings. The cases relied on for the plaintiff, are, one from 1 Esp. Rep. 302, and *De Best* v *Atkinson*, 2 H. Bl. 336. If the former be law, it is very distinguishable from this case. There, the defendant, at *the time of endorsing*, expected to pay the note, and received *the funds from the maker* to do it with. But the latter authority has been chiefly pressed, and is a case that has been often urged on this point. *It*, too, is unlike the case befor us. There, the *insolvency* of the maker was known to *all* the parties, at the time of making and en-

dorsing the note; and the opinion of the Chief Justice is founded on *that* circumstance. But if it were expressly in point, the authority of it would not perhaps be entirely admitted. In a short time after that decision, the doctrine of it came again under consideration, in *Nicholson* v *Doulhil*, 2 H. Bl. 609, and was, at least, shaken, if not overruled.

In this last case, the endorsement was made in execution of a previous agreement of the endorser to guarantee a debt of the maker, whose affairs were known at the time to be embarrassed, and who became insolvent before the note fell due. When the note became payable, the endorser knew that the maker could not pay it, and the impresssion of all parties was, that the endorser was to pay it. In this case, strong as it was against the endorser, and great as the apparent justice of making him liable was, the court admitted the distinction between a bill drawn without funds or credit, and a *promissory note* of an insolvent maker—as to which latter, the rule is laid down, that *notice of dishonor must in all cases be given.* I believe this law has been considered as settled ever since, and that notice has in no case been dispensed with, unless perhaps it was on the express point of *De Best* v *Atkinson*, that is, where the insolvency of the maker was known to *all* parties at the time of endorsement. And it may be doubted, whether even that exception would be now allowed. For my own part, I cannot perceive, either in common sense, or *in the natare of an engagement of an endorser*, any reason why an endorser, who has had no *benefit*, and who accommodated with his credit the maker, to whom all the *value* went, should not be entitled to the strictest notice. But this case does not come within even the weakest of the foregoing authorities. Here is no *connection* between the maker and endorser. There was no understanding that M'Lean was to pay in the *first* resort. On the contrary, he was *astonished* when he understood that Anderson had not paid; and so far from there being an insolvency of the maker, at the time of making or endorsing the note, or before or when it fell due, the case states, that as late as August and September, 1812, he had visible estate to

the value of 6,000 or $7,000. How, then, can it be supposed, that the defendant was considered as *primarily* liable to Smith for the payment of this note? All the acts of the plaintiff falsify such a presumption, as well as the condition of the maker when the note was made and fell due. When the note became payable, the plaintiff wanted his money. To whom did he apply? To Anderson. Upon whose request did he give further indulgence? Anderson's. And what was the inducement to forbear? Anderson's promise to make payment in a few days, as well as an unwillingness to affect his credit by protesting at bank, where, as Anderson told him, there were no funds to meet the note. Indeed there could be no reason for M'Lean to undertake an immediate liability—there was no necessity to the plaintiff that *he* should pay the note—the maker was well able to do it himself. On the particular circumstances, therefore, there is no hardship to the plaintiff; but there would be great hardship on M'Lean to dispense with a notice, which if it had been given to him, might, and probably would, have enabled him to save himself out of Anderson's effects. Regarding this point of the case, therefore, according to the particular facts, or testing it by the general principles of the law, I am clearly of opinion, that the defendant was entitled to strict notice of non-payment by the maker of the note.

But it is further contended, that the conversation of the defendant with the plaintiff's agent, as stated in the case, amounted to a *waiver of notice*. I do not see any reason why it should. He certainly does not *expressly* waive it, and I cannot perceive why we should imply it. But if he had expressly waived the want of notice, and ever made a new promise, I do not know that the plaintiff could have recovered, either on the count on the endorsement, or on the new promise. But there is no separate count on the promise. Indeed, according to my opinion already stated, the defendant had been previously discharged. Would not his promise, therefore, be *nudum pactum* and void? However, I do not say how I would think on that point, being of opin-

ion that there is nothing like a promise of waiver of notice in the case stated.

There is also another question which was not touched in the argument, and is against the plaintiff in my opinion. The not was made *payable at the State Bank.* The holder of a bill with a special acceptance, payable at a *particular place*, must present it *there*, when it falls due ; otherwise the drawer is discharged. 7 East's Rep. 385. As between the holder and endorser, a promissory note payable at a particur lar place, is *quo ad hoc*, precisely like a bill with a special acceptance, as above, as between the holder and drawer. It is a part of the contract, that the note should be presented at bank. Here, indeed, Anderson dispensed with such presentment. But that shall uot affect M'Lean. *His* contract is, that payment of the note *should* be demanded at the bank. How can we say, that Anderson would not have found means to discharge the note at any sacrifice, rather than suffer a public dishonor of his note by a protest at bank? Indeed, such a consideration might have induced the defendant originally to have the note made payable at bank. Be that as it may, the *agreement* was on *special* terms, and those terms must be complied with by the plaintiff, before he seeks any remedy against the defendant.

I agree, therefore, with the court below, upon all these points, and think the verdict was right. It is unnecessary for me to say any thing on the other questions respecting the authority of the attorney to strike out the defendant's endorsement, or the effect of such striking out, being in favor of the defendant on the other grounds.

SEAWELL, J. The striking out the endorsement by an authorised holder of the note, not being by *mistake*, but because it stood in the way of a suit he was prosecuting, by the direction and for the benefit of the plaintiff, must forever exonerate the endorser from all liability. For what purpose was it stricken out? Was it that the bill was still to retain the qualities of one endorsed? Surely not. It was to place it in the same situation *it would* have stood if no endorsement had ever been made, and this the rightful hold-

er was competent to do; for the endorsement was for his benefit—he might fill it up with what he pleased, either his own name, or that of his principal, or might strike it out as he has done. There can be no foundation for saying the attorney had no authority; for if he was the authorised holder of the note to bring suit, and in *bringing* the suit, he did any thing within the scope of such acts as belong to the office of an attorney to perform, the act is as binding on the principal, as if done by himself: For would it be contended, that an endorsement could not be struck out by the attorney of record; but that the court must require the principal to be personally present, giving his assent? The universal course of practice to the contrary, is a sufficient answer to such a question. If the plaintiff has lost any benefit by the act, he must bear it, as he was entitled to all the advantage which might have resulted from it.

The case states the endorser to be a mere security. What would a Court of Equity say, to a bill to set up a bond against one, where the obligation had been intentionally cancelled by the agent of the person beneficially interested? It would say, being discharged at law, not by accident or mistake, there is no equity to revive it. You had the right and power to treat it as you pleased, and you have exercised it; but having repented on being disappointed in your expectations, there is no reason to take from such security a *defence*, which you have either generously or indiscreetly given him. In this case, the defendant is *only* bound by a legal tie—the endorsement; that being stricken out, he stands as another individual; and the law will never raise an implied promise, where a Court of Equity would refuse its assistance—both are governed by the same equitable rules.

I concur with Brother RUFFIN also, as to the other point.

NOTE.—Upon the first point, see *Fons* v *Kelly*, 2 Hayw. Rep. 45. Upon the second, see *Sullivan* v *Mitchell*, 1 Car. L. Repos. 482.

CRUMPLER'S EX'RS *vs.* GLISSON—Page 79.

That the sheriff was kept off by force of arms is a good return upon *mesne* process; for upon such process, he may, but is not obliged to, raise the *posse comitatus*.

An action on the case was brought against the defendant, sheriff of Duplin county, for the following return made on a writ of *capias ad respondendum*, which was put into his hands at the suit of the plaintiff against one Beck: "Not executed. The sheriff was kept off by force of arms."

A verdict was found for the defendant, and a motion for a new trial made on the part of the plaintiff.

M'Millan, for the defendant. It has long since been settled, that where the arrest is upon mesne process, and not upon execution, the sheriff is not bound to take the *posse comitatus*, and therefore upon such process it is a good return to return the rescue. Cro. Jac. 419. He is not obliged to raise the *posse* on mesne process, though he may do it. Cro. Eliz. 863.

DANIEL, J. delivered the opinion of the court:

On *mesne* process the sheriff may, but is not obliged to raise the *posse*. It cannot be presumed, that where the party is bailable, the writ will be resisted; but if it is resisted, and the sheriff kept off by force of arms, we cannot think he is liable to the plaintiff; because he had not the *posse comitatus*, at his back. 1 Stra. 433, 434.

New trial refused.

M'NEIL *vs.* LEWIS—Page 80.

No cases in relation to the entry of vacant lands are operated upon by the act of 1779, authorising *caveats*, except those which arose from the discontinuance of the land offices. In all other cases the first enterer must prevail. The acts of limitation, in regard to land titles, are founded upon the presumption that a grant once existed and has been lost; but in a *caveat* both parties admit the land to be vacant, and the question is, to whom shall a title be made.

This was a motion to award a *venire facias de novo*, on the verdict of a jury, in a case of caveat, made before HALL, J. at Bladen Superior Court. The court ordered the *venire* to issue; from which the defendant appealed to this court; and the question discussed here was, Whether the verdict contained such certainty as would authorise the court to pronounce judgment for either party; or whether a *venire* ought not to issue.

The material part of the verdict was, "We were enabled to collect that M'Neil had been in possession, for more than twenty years, of the land in dispute, by known and visible boundaries; and if there is any vacant land embraced therein, we are of opinion that M'Neil is entitled to a preference as respects entry."

M'Kay, for the appellant.

Enough appears upon the verdict to warrant the judgment of the court in favor of Lewis, who alone made an entry of the land, which was vacant. The only question that can arise upon a caveat is, Who made the first entry. Acts 1777 & 1779.

If a jury, after finding a fact, specially take upon themselves to draw a conclusion not warranted by law, the court, in giving judgment, will disregard it. Priddle's case, 11 Rep. 10. So if the issue be, whether there is a seisin, and the jury, after finding some fact specially, conclude with saying that this amounts to seisin, the court will not regard such conclusion, but will judge whether the fact do

amount to a seisin. Bro. Verd. Pl. 41. From the fact of twenty years' possession, the jury have concluded, that M'Neil has a preference, as respects entry; but such is not a legal conclusion, and will therefore be disregarded.

M'Millan, for the Appellee.

The court will not determine a question of law upon a verdict, unless every proper fact be found by the jury. *Lodge* v *Jennings*, Gil. E. Rep. 255—6. The verdict cannot be amended, although the counsel for both parties consent to it: for that would be to make a new verdict as to the fact not found. But the proper course in such a case is, to award a *venire facias de novo*. 2 Lill. Abr. 791, B. It may be admitted, that judgment cannot be rendered for M'Neil on this finding; because it is not stated that he made an entry. But, for the same reason, it ought not to be rendered for Lewis; for neither is it stated that he made an entry. That should have been stated *expressly*, and cannot be implied. *Smith* v *Foeves*, Noy's Rep. 147.

Seawell, J. delivered the opinion of the court:

When the Land Offices were opened, after the Revolution, every citizen of the State, by the express words of the act, had permission to enter vacant lands; and the only preference as to the right of entry, is specified in the 6th section of the act, and this right grew out of the Revolution, which shut up the different offices before the *bona fide* settlers had an opportunity of perfecting their titles. The Legislature, with a view of preventing a new enterer from turning out one who had entered and improved lands that he had had an opportunity of patenting, or who had seated himself with intention of entering, but had been disappointed by the discontinuance of the offices, enacted, that *such* disputes should be decided by a jury on the premises; but the same act declared, that this preference from prior entry or prior occupancy, should cease, unless such enterer or occupant should perfect his title by January, 1779. In 1779, the Legislature perceiving that a difficulty had arisen in construing the act of 1777, inasmuch as it was not declared by that act, which should be preferred, a prior occupancy or a prior entry, an

act of that session declares, that an occupancy of seven years shall be preferred. Every other case, therefore, but those which sprang from the discontinuance of the land offices, remains unopperated upon by the act; and in all others, the first enterer must prevail.

None of our acts of limitation can have any influence, whether with or without color of title; for they are bottomed upon a presumption that a grant once existed, but has been lost; but in the case of a caveat, both parties admit the lands to be vacant, but are disputing as to whom a title *shall be made.*

The awarding the *venire facias de novo*, was therefore wrong, and should be set aside, and judgment rendered in favor of the enterer.

NOTE.—See *Featherston* v *Mills*, 4 Dev. Rep. 596. The whole law in relation to the subject of entries is embodied in the act concerning "Entries and Grants," 1 Rev. Stat. ch. 42.

HARVY *vs.* PIKE—Page 82.

The master of a vessel is liable upon a bill of lading signed by him, containing no other exception than that of the dangers of the sea, though the goods are damaged by the unskilfulness of the pilot.

The shipper may sue either the master or owner upon a bill of lading signed by the master.

Whether an action will lie for a *tort* against the master of a vessel for an injury done by the vessel, or to the goods while a pilot is on board, Qu?

This was an action of *assumpsit*, tried before SEAWELL, J. at Craven Superior Court, where a verdict, under the charge of the court, was found for the defendant. The facts were, that a quantity of merchandize was shipped for the plaintiff at New York, to be delivered at Newbern, on board a vessel of which the defendant was Captain. He signed a bill of lading in the usual form, containing no other excep-

tion than that of the dangers of the sea. The merchandize received damage on the voyage, and the court, in its direction to the Jury, stated to them, that if the damage was occasioned by the unskilfulness of the pilot, after he came on board, the Captain was not liable. A motion was made for a new trial, on the ground of misdirection, and the Judge doubting the correctness of the opinion he had given, sent the case to this court.

The cause was argued at July Term, 1816, by *Badger* for the plaintiff, and *Gaston* for the defendant; and the court held it under advisement till this Term.

Gaston argued for the defendant, that he ought not to be made liable for the unskilfulness of the pilot, whose quaiifications and appointment are decided on by public authority. Acts 1783, 2. 20. That the defendant was compellable to receive the pilot on board; for if he had neglected to do so, and any accident had happened to either vessel or cargo, no recovery could be effected on the policy of insurance—the owner always undertaking, in such case, that the ship is seaworthy; that she has a sufficient crew, and a Captain and pilot of competent skill. 7 Term Rep. 160. Not to take a pilot on board, is gross negligence in the Captain; Lawrence, J. 7 Term, 160; and it would seem inconsistent, when he does take one, qualified according to law, that he should be made liabld for his acts. The pilot, while on board, has the exclusive direction and control of the ship. He is master *pro hac vice;* and in comfirmity with this principle, it has been decided, that where a vessel ran foul of another and injured her, that the master of the vessel doing the injury was not liable to the owners of the other vessel, because there was a pilot on board at the time. 1 Johns. 305.

It would certainly be more just, that the pilot who occasioned the injury, should be made responsible to the plaintiff, than the Captain who has been in no fault. If, however, his contract is relied upon, the answer is, he entered into that as agent for the owner; he is called in the bill of lading, "Master for the present voyage," and no inference arises from it that he was any thing more. Wherever a person

enters into a contract as the known agent of another, he is not personally liable, but only the principal. 2 Car. Law Rep. 83, Poots v. Lazarus. The owner might have discharged the Master at any time after signing the bill of lading, even before the commencement of the voyage; and to make him liable for the loss of goods, after his authority to take care of them was at an end, would place a master of a vessel in a very perilous situation.

Badger, for the plaintiff.

1. Without any bill of lading or express undertaking, a carrier for hire is an insurer, and responsible for every loss, *except by the act of God*, or the public enemies, Com. Contr. 290 for robbery, fire, leakage, &c. 320 *et seq Smith* v *Shepard*, Abbot on Shipping, 203. Negligence does not enter into the grounds of the action. It is not sufficient for the carrier to disprove actual negligence, and to shew all possible care; every thing is *negligence* which the law does not excuse. Dale v Hall, 1 Wils. 282. 2 Com. Cont. 321, S. C. In the case of *Forward* v *Pittard*, Lord Mansfield says, "There is a nice distinction between *the act of God*, and inevitable necessity." "The carrier is liable in this case, inasmuch as he is liable for *inevitable accident*" 1 Term Rep. p. 33, 34. The defendant, then, is liable in this case, as a carrier, although the loss happened "*by inevitable accident.*"

2. But the defendant has engaged, in this bill of lading, that the goods shall be delivered to the plaintiff, or his order, in the same good order in which they were received, "the dangers of the seas alone excepted." The goods were not so delivered, and the defendant is therefore liable in damages to the plaintiff, unless the loss be covered by the exception in the bill of lading. No force however irresistible, no accident however inevitable, can excuse him, unless it be included in the words "dangers of the seas," the only exception to his liability in the bill of lading. Paradine v. Jane, Alw. Rep. 27. "When the law creates a duty or charge, and the party is disabled to perform it, without any default in him, then the law will excuse him; but when the party, by his

own contract, creates a duty or charge upon himself, he is bound to perform it, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract.*" "Where a covenant is express, there must be *performance*, nor shall it be discharged by any collateral matter whatever. Monk's Coo. 2 Str. 763. It is clear, that the loss in this case, is not by a peril of the sea. Park. Inst. 61. 1 Show. 323.

But it is said, that the master signs this bill as the agent of the owners, and therefore we must look to them, not him, in this case. The rule is not, that any agent is not answerable, but is only where the agent, *at the time of the contract*, discloses the name of his principal; 1 Com. Cont. 248. 2 Esp. Rep. 567. and this bill of lading does not disclose the name of the owners: 1 Com. Cont. 248. So that if he were an agent, he would not be discharged.

But the defendant signs as the principal party to the bill of lading. No agency appears on the bill. He signs for himself, and you cannot look out of the bill of lading. But he cannot sign as agent; because if he did, no action could be sustained against him on the bill, under any circumstances, whereas a multitude of cases shew that such an action can be sustained.

But it is said, a pilot was on board, whom the master was *compelled* to receive, and upon whom the law casts the absolute control of the ship. If the master of the vessel be the principal in the contract, this cannot excuse him, even if it were correct; but the position is not correct. The law does not compel the master to receive the pilot, but only to pay him. He may refuse him if he please. Acts 1783, c. 20, § 8.

The pilot has not a superior authority in the vessel above that of the master. "The pilot is one who hath the control of the vessel under the master." Jac. L. Dict. verb pilot. The case of *Snell* v *Rich*, 1 Johns. Rep. 305, is no doubt a correct decision, but is not at all applicable to this case. There, an action on the case was brought against the master, for carelessly running down another vessel. The master was

not on board, and the vessel was under the command of a pilot, who was master *pro tem.* Here, the master is sued on his contract, and is answerable at all events, besides those excepted. Every thing done in the voyage is for his discharge—to fulfil his contract—for his benefit. The pilot is, therefore, a person employed by him, and he is answerable for any injury happening through the pilot. 6 Term Rep. 411. 1 Bos. & Pul. 404. 2 Esp. N. P. 2 9.

I deny that the master would be discharged, although he should cease to be master before the completion, or even commencement of the voyage. He is liable in that case as in others. Thus is the lessor bound to pay rent and rebuild, although the building be destroyed by fire or tempest. Pasteur v. John Jones & al. Conf. Rep. 194.

TAYLOR, C. J. The question presented by this record is, whether the damage done to the plaintiff's goods, was occasioned by any of those causes, which according to the general rules of law, or the contract of the parties in the particular case, afford an excuse for not carrying them in safety.

Though there is a common form of bills of lading in use, yet, like every other contract, it may be moulded according to the will of the parties by whom it is made; it may be framed without any exceptions, and then left to be construed by the general principles of law, or other exceptions than those usually inserted, may be introduced, and thus the responsibility of the master or owner narrowed. In *Smith* v *Shepard*, Abbot 165, there was no bill of lading, and the decision was made on general principles, applicable to common carriers, that the act of God which would excuse the defendant, must be immediate. Afterwards several exceptions were added to the form, and besides natural accidents, many which proceed from the agency of men, are now commonly provided against. But the parties in this case have thought proper to stipulate, that only perils of the sea shall excuse the defendant for the non-performance of his contract, and therefore it is clear, that he undertakes, at all hazards, to indemnify the plaintiff against all other perils or losses. The

unskilfulness of the pilot occasioned the loss; and as that is not a peril of the sea, the plaintiff is entitled to recover.

I think it is equally clear, that the plaintiff has his election to sue either the master or the owner upon a bill of lading. The law will not compel him to search for the owners and sue them; they may be in a foreign country, or it might be impossible to find them. *Morse* v *Slue.* Ventris 190, 238.

But I am not prepared to say, that the master would not be liable, even in an action founded on tort, for damage done to the goods while the pilot was on board. The inclination of my mind is rather that he would be liable. The opinion of the court, in *Snell* v *Rich*, seems to be founded on the circumstance that the master was not on board when the accident happened. In *Berry* v *Dondaldson*, 4 Dallas 206 an action of tort was held to be maintainable against the owner of the vessel. And *Molly*, who writes exclusively on Maritime Law, says, "But if a ship shall miscarry coming up the river, under the charge of the pilot, it has been a question whether the master should answer in case of the insufficieney of the pilot; or whether the merchant may have his remedy against both? It hath been conceived, that the merchant hath his election to charge either; and if the master, then he must lick himself whole of the pilot."

Seawell, J. The action in this case is founded upon the contract of the defendant, who undertook to deliver the goods in question at the port of Newbern, *dangers of the sea excepted.* They have not been delivered; and it is admitted by the case, that this default has not been occasioned by any peril of the sea, but through the *unskilfulness* of a pilot. Now it may be asked, if the circumstance that the vessel was to be placed under the direction of a pilot, was not at least known to the *defendant?* And whether, if he had thought proper, he could not have *provided* against a loss whilst in the hands of the pilot? It is, however, sufficient to say, the defendant *has not* provided against it; and being bound to *insure* against every accident or event, not excepted, he must answer to the plaintiff for a non-performance. Had the defendant been charged with a tort for some

injury done by the *vessel*, whilst under the control of the pilot, that case would have differed widely from the present. The defendant in such case, not being the *author* of the mischief, neither continuing it, nor having it in his power to avoid it, would not be liable; but should he, in such case, have become *insurer* against it, it would hardly be doubted but that he would be liable upon his engagement.

The directions to the jury below, were clearly wrong, and the rule for a new trial should be absolute.

RUFFIN, J. concurred in the opinion of SEAWELL, J.

DICKINSON *vs.* RODMAN—Page 88.

Where W. is indebted to both the plaintiff and defendant, and the latter authorises an agent to collect his debt, but not to bind him by deed, and the agent purchases from W. a vessel on account of his principal, whose debt is to go in part payment, and by an agreement under seal the balance is to be paid to the plaintiff; afterwards the defendant knowing what his agent had done, approves of it and receives the vessel; still the plaintiff cannot maintain assumpsit against the defendant for the sum agreed to be paid to him by the deed.

The defendant, then a resident of New York, sent Williams to this State to collect a debt due from Willis, but did not authorize his agent to bind him by deed. With the view of getting satisfaction for the debt, Williams entered into an agreement, under seal, with Willis, whereby the latter sold to him, as agent of the defendant, a vessel then on the stocks, which he undertook to complete and then deliver to whomsoever should be appointed by the defendant to receive her. In consideration whereof, and in payment for the vessel, the agreement states, that the defendant should give up Willis's note, which he held, and pay the balance which might remain remain due, estimated at $770, to Dickinson, the plaintiff. The agreement was executed by Willis

on the one part, and by Williams, as agent of Rodman, on the other part.

When the agreement was executed, the plaintiff was a large creditor of Willis's, and approved of the contract, as securing to him payment of part of his debt. The vessel was not completed according to the contract, either as to the time or manner. But the defendant afterwards, knowing what Williams had done, approved of it, took possession of the vessel, and used it as his own.

The plaintiff brought an action of *assumpsit* against the defendant to recover the sum contracted to be paid to him under the agreement; for which he obtained a verdict.

A motion is made for a new trial, on two grounds:

1st. That an action of *assumpsit* will not lie.

2dly. If it will, that the non performance of Willis's part of the contract, relieves the defendant from the plaintiff's claim.

Mordecai, for the defendant.

The plaintiff cannot maintain an action of assumpsit against the defendant; because here is an agreement under hand and seal; upon which, Willis, had he complied with the terms of it, might have maintained an action of covedant against Rodman. To this the objection is, that it does not appear that Williams was authorised to bind Rodman by deed. But how can the plaintiff make Rodman liable at all? Williams was an agent to *collect a debt*. He was a special agent, who cannot bind his principal by any acts, in which he exceeds his authority. 3 Term. Rep. 760. He was not authorized to contract a debt.

It is not then, that Rodman is liable for William's act, because he was his agent, but on account of the subsequent confirmation of his act. *Omnis ratihabito retro trahiter et mandato æquiparatur.* If, therefore, Rodman could have authorized him, by parol, to have executed the deed, he might confirm it afterwards by parol. In Com. Dig. Attorney, c. 5, it is only said that an attorney, must generally be constituted by deed; but *Ball* v *Dunsterville*, 4 T. Rep. 34, where one signed

in presence of the other, *McKay* v *Bloodgood*, 9 Johns. 285, where one signed by consent of the other, prove, that a consent without deed, is sufficient. Rodman, having confirmed the contract, is as much liable as the partner who authorised the other to seal for him. And the technical mode of signing the instrument makes no difference, according to the case of *Potts* v *Lazarus*. 2 Law. Rep. 83.

If Rodman is bound, it must be, either because his agent had a right to bind him, or because of his own act. But his agent could not bind him to pay a debt. It must, then, rest on his own act, which confirmed the *deed;* and if that does not bind him, he is not bound at all. Now where there is a deed made *inter partes*, one not a party, cannot sue on it; because with him, no contract is made by the deed, 1 Lev. 235, Chit. Plead. 3, and if there were, assumpsit would not lie, because the defendant is liable in a higher action.

But let it be admitted, that assumpsit could be maintained, and the deed used merely as evidence of the contract, it is clear, that Dickinson could not maintain it, because he was a stranger to the consideration. Selw. N. P. 60. *Crow* v *Rogers*, Stra. 592. Dickenson lost nothing. He might even have sued Willis the next day, and forbearance for an indefinite time is no consideration. Pow. Con. 333—4.

Another light in which the case ought to be viewed, arises from the construction of the contract, in which the covenants are evidently dependant; and finishing the vessel forms a condition precedent. It is clear, that Rodman did not intend that Willis should get further in his debt. Willis was a bankrupt; and the object of Rodman was to secure himself, which he could only do by requiring that the vessel should be *completed and delivered* to him before he made the payment. But, according to the plaintiff's construction, Rodman would be liable although Willis never had completed or delivered the vessel. *Goodison* v *Nun*, 4 Term. Rep. 761. *Kingston* v *Preston*, Doug. 689. *Glasbrook* v *Woodson*, 8 Term. Rep. 366. Rodman's having taken possession afterwards, can make no difference; for if Willis had sued on the contract, he could only recover by showing a perfor-

mance on his part; though he might have recovered the value of the vessel by some other action. But if Dickinson recovers, it must be on the contract; for thence alone can he derive any claim against Rodman.

SEAWELL, J. delivered the opinion of the court:

Suppose, in this case, Rodman had signed the deed, still no action could be maintained by Dickinson, for the contract was with Willis. Then what is the effect of his assent? It can only be *co-extensive* with the deed. It may, however, be said, that it is to be inferred from the case, that Rodman *promised* Dickinson, still it recurs, that the promise must necessarily relate to the terms of the written contract; and when *assumpsit* is brought by Dickinson, it is in the very *nature* of such action to allow the defendant the full benefit of all the equitable circumstances of the case, and these, in the present case, will be best ascertained, by inquiring what they would have been if Willis had brought the present action; for it would be strange to say, that in a case where no consideration moved from Dickinson, either by his yielding any benefit, or sustaining any loss, that a promise made to him by one of the parties of a contract to which he was a stranger, should place him in a better situation than a party would stand. Indeed, it would seem *strange*, if he could, in such case, support any action.

If, then, Willis had brought his action of assumpsit, upon the assent of Rodman, what could *he* have recovered under the facts of this case? Not the full price Rodman was to pay; for he had not *fully* completed his contract, and it is evident from the written contract, that the money was not to be paid till after finishing the vessel. But the vessel was taken into possession by Rodman, and converted to his use. *He*, therefore, should not *hold* it and pay nothing, but must pay what she was *worth*. That worth, for aught which appears, may be greatly blow Rodman's own debt; and there can be little equity in *taking* from the pocket of one losing creditor, and placing it in the pocket of another, where they are both equally unfortunate, and one has not *contributed*

to the loss of the other. The present plaintiff, therefore, cannot recover, and the rule for a new trial must be absolute.

NOTE.—See *Peck, Welford & Co.* v *Gilmer*, 4 Dev. & Bat. 249.

ENGLISH *vs.* REYNOLDS—Page 92.

By the special wording of the two acts of 1777 and 1793, (1 Rev. Stat. ch. 6,) a final judgment in an original attachment is equivalent to a final judgment in any other case; and debt will lie on it.

This was an action of debt brought upon a judgment obtained in Rutherford County Court, upon an attachment taken out by Plaintiff v Defendant, levied upon property which was not replevied; and not being sufficient to satisfy the judgment, this action was brought to recover the balance. The plaintiff produced the judgment of the County Court; upon which the jury gave a verdict for him. It is referred to the Supreme Court, whether the judgment taken upon the attachment is conclusive, *prima facie*, or any evidence. If it is conclusive, judgment to be for plaintiff; if *prima facie*, or no evidence, then a new trial to be granted.

The case was submitted without argument.

DANIEL, J. delivered the opinion of the court:

The act of Assembly of 1793, c. 16, § 8, makes it the duty of the clerk on the return of an original attachment, "to cause the same, by public advertisement, to be made known for three months next after the return made as aforesaid," and the court cannot enter final judgment until this species of notice is given. But when the act is complied with, the judgment of the court is *final*. This advertisment is in lieu of personal notice, as two *nihils* on a *scire facias* are considered notice. The act of 1777 makes use of these words, "Any person whose estate is attached, may, by himself or agent, at any time before *final judgment entered*, or

writ of inquiry executed, upon giving special bail, replevy the estate so attached and plead to issue." From an examination of the above mentioned acts of Assembly, it does appear to my mind, the Legislature considered a final judgment on an attachment in the same light as a final judgment in any other case.

Judgment for plaintiff.

NOTE.—See *Armstrong* v *Harshaw*, 1 Dev. Rep. 187. *Washington* v *Sanders*, 2 Dev. Rep. 343. *Skinner* v *Moore*, 2 Dev. & Bat. Rep. 138.

STATE *vs.* BENJAMIN AND SAMUEL SPARROW—Page 93.

Where an indictment states that the defendant, on a certain day in a certain year, with force and arms, *at and in the county of Craven*, a male slave called J. B. of the value of fifty shillings, and the property of one W. M. of the county of Craven, in the State of N. C., feloniously &c., and the jury find the defendant guilty on such count, judgment will not be arrested for omitting the words "then and there being found," or what is technically called the *ad tunc and ibidem*.

The defendants were indicted under the act of 1779, to prevent the stealing of slaves, &c. The indictment contained six counts; upon all which, the jury found a verdict of not guilty, except on the second, on which they found the defendants guilty. The second count is in these words:

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Benjamin Sparrow and Samuel Sparrow, afterwards, to wit, on the said first day of November, in the year of our Lord one thousand eight hundred and fifteen, with force and arms, at and in the county of Craven, in the State of North Carolina aforesaid, one other male slave called Jack Battle, of the value of fifty shillings, and the property of one William P. Moore, of the county of Craven, in the State of North Carolina, feloniously and by seduction, did take and convey away, with an intention the

slave called Jack Battle last aforesaid, to sell and dispose of to another person, contrary to an act of the General Assembly entitled "An Act to prevent the stealing of slaves, or by violence, seduction, or any other means taking or conveying away any slave or slaves the property of another, and for other purposes therein mentioned," and against the peace and dignity of the State."

A motion was made to arrest the judgment, because the time and place of committing the offence are not set forth in the second count with sufficient precision. The question was referred to this court.

SEAWELL, J. The indictment charges, that the defendants, on a certain day and year, *at* and *in* the county of Craven, one male slave named Jack Battle, feloniously and by seduction, *did take and convey* away; and the reason in arrest of judgment is, that it is not stated with sufficient explicitness, that the seduction and taking and conveying away *were* in the county of Craven: and precedents of indictments have been cited to show, that in every case of larceny, the words, "then and there being," are set forth after the thing stolen is described. Now, although it is true, that precedents are high authority as to what the law is, yet in this case, they only prove, that they contain these words; for it is certain, that most of them contain many things which *never* were essential, and some they retain which long since have become useless, as the words "moved and seduced by the instigation of the Devil," and "in the peace of God:" and in indictments for perjury, they conclude "to the great displeasure of Almighty God:" again, in homicide, the *value* of the instrument occasioning the death, which formerly was forfeited as a deodand. It is not therefore *conclusive*, that no indictment is good which departs in *any* particular from the precedents. The truth is, that their sufficiency is referable to no precise standard, but must, in every case, depend upon *common* sense and the plain reason of the thing, as Hawkins expresses it, and which can only be applied to general principles, and the leading ones upon this subject are, that nothing material in *constituting* the offence, shall be ta-

ken by inference, or by intendment, as the law writers express it, but must be *positively* alleged, and that those things which are material, *shall* be alleged with all the *circumstances* which *they themselves* presuppose; as when a stroke constitutes the offence, and is therefore material, it must be positively stated to be given—for instance, "*did strike*, or to use the phrase usually mentioned "*per cussit*," and at what time and place; and when so alleged, it must be stated in what manner, or with which hand. So when a *wound* occasions the death, and is therefore stated, as it *presupposes* length, breadth and depth, they must be stated: But where a bruise is alleged, as *that* presupposes neither, *it* in itself is sufficient as to the *manner;* and the great difficulty in most of the cases is, in ascertaining whether the facts *are* so alleged.

The design of the law in requiring these niceties, is, to enable the defendant to make defence, by *meeting* the charge; that the jury may *appear* to be warranted in the conclusion they have drawn, and that the court may *see* such a definite crime, as to apply the punishment which the law has prescribed; and Lord *Coke*, upon this subject, has said that *nimia subti litas in jure reprobatur;* and Lord Chief Justice *De Gray* has also said, that the only true rule was, "that the court and jury must understand the record as the rest of the world do."

In cases of murder, the books say, that charging the assault with malice, on a particular day and year and place, there is no necessity, in the following clause, which states the stroke, to repeat that it was given with malice, if the words "*then and there*" be used. Now, in such case, it is clear, that the stroke *with malice*, can be more explicitly stated, and it is only made so, by being given at the same *time* and *place* of the assault; and the reason they assign is, that a repetition would produce too much tautology, 4 Co. Rep. 41. But where the jury only find a *conclusion*, as that the prisoner *murdered* the deceased, the guilt can only be *inferred*, by supposing the jury were judges of the law, and knew what constituted murder; but a finding that one

man *at* a certain place, and *on* a certain day and year, assaulted another, as *to the assault*, as "explicitly" affirms that the person assaulted *was* there, as the English language is capable of, without incumbering a plain meaning with supernumerary words; for the *fact* found (and not a conclusion) *includes* the presence of the party assaulted. When an indictment charges that A. assaulted B. with a sword, and cut off his right arm, surely it does include that B there *had* a right arm. The act of *taking* and *conveying away*, therefore, necessarily includes that the thing, when *so taken*, was *there*. The force of the objection, therefore, when examining this indictment, is, to my mind, *totally* without foundation. Lord *Coke* says, there are three kinds of certainties in judicial proceedings; certainty to a common intent, certainty to a certain intent in general, and certainty to a certain intent in every particular: The first is required in pleas, the second in indictments, and the third *only* in cases of estoppel. The doubt, I think, has been occasioned by a supposed analogy between this and Cotten's case, reported by Croke, and noticed by Hale, in his History of Pleas of the Crown. There, Cotten was indicted for murder, and the indictment stated, that at a certain place and time, Cotten, the prisoner, *having* an axe in his hand, struck one Mary Spencer, whereof she died. In that case, the court held, that the stroke was not stated to have been given *on* any particular day, or *at* any particular place; and as the stroke *constituted* the offence, according to the rule already laid down, as every *act* presupposes *time* and *place*, they must be stated. Now, upon an examination of Cotten's case, and divers others where the words *ad tunc et ibidem* were held necessary, it was always in compliance with this rule, and not with a view of locating the object so as to make *that* present, when it is charged to be *acted* upon; but for the purpose of confining it *when* acted to a *time* and *place antecedently* stated. And in this very case of Cotten's, the court determined, that alleging, that on a certain day and place, the prisoner having an axe, did necessarily find that the axe *was* there; for, say they, it only appears by the indictment, that the prisoner had the axe

on the day and place mentioned; but it does not appear when or where the the stroke was given. Cotten's case therefore, as far as it is any authority, seems to me in support of the present indictment.

If this indictment had charged, that the prisoners, on the day and place mentioned, *had seduced*, or *did seduce* the slave, and that they "did take and convey him away," then, according to Cotten's case, the *adtunc & ibidem* would have been necessary to connect the latter acts with the first; for the time and place would then only relate to the first act—the first act, in this indictment, is the taking and conveying away, therefore they *do* relate to them.

A case which approaches near the present, is Heydon's, reported by Lord *Coke*, where the indictment charged, that Heydon and others, at a certain day and place, of their malice aforethought and as felons, *in dictum Edwd. Savage adtunc et ibidem (and not "existente") insultum et affrarium fecerunt:*" and many objections were taken to the indictment; and amongst others, that the indictment did not state the deceased was in the peace of God. But it did not there occur to the counsel or court, as material to allege, that when the assault was made upon the deceased, he was there —*existente*—though confessedly to be found in most of the precedents. I cannot, therefore, bring my mind to doubt upon the score of authority; and as to the result to be derived from an application of the rules of common sense, and the reason of things, which Hawkins maintains is the true rule, I think there can be *no* diversity there. I am, therefore *clearly* of opinion, that the indictment is sufficient; that it *doth* allege, that the slave in the county of Craven, on a certain day, was by seduction taken and conveyed away, and that the prisoners are also alleged to be the perpetrators thereof, and therefore, there should be Judgment for the State.

TAYLOR C. J. HALL, J, and RUFFIN J. concurred.
DANIEL J. dissented.

NOTE.—See act of 1811 (1 Rev. Stat. ch. 35, sec. 12) and *State* v *Cherry*, 3 Murph. Rep. 7.

CUMMINGS *vs.* MAC GILL—Page 98.

The action of replevin cannot be supported unless a *taking* is proved.

Replevin for a slave which was the property of Tryon Smith, in Dec. 1814, when the sheriff of Bladen made a levy on her, by virtue of an execution against said Smith; and at public sale set her up to the highest bidder at the court house in Bladen, on the 24th of the same month, when she was struck off to the defendant, the last and highest bidder, at the price of $90 15, the slave being then present. The sheriff then, at defendant's request, gave him an indulgence for the payment of the money until the next day. The defendant having failed to pay the money to the sheriff when called on the next day, for that purpose, agreeably to their previous arrangement, the sheriff soon after executed a bill of sale for said slave to the plaintiff, and delivered the negro slave to him, he being the next highest bidder, without having again exposed the slave to public sale to the highest bidder. Soon after, the slave being found in the possession of the defendant, who refused to give her up on the demand of the plaintiff, this suit was instituted. The charge of the court being in favour of the plaintiff, a verdict was found accordingly. Motion for a new trial on behalf of defendant, upon the ground that the charge of the court was against law, &c. Motion overruled. From which judgment, an appeal is taken to the Supreme Court.

Questions for the consideration of the Supreme Court:

1st. Is the action of Replevin sustainable in this State?

2d. Had the sheriff a right to adopt the bid of the plaintiff, after having regularly struck off the slave to the defendant, as the last and highest bidder, without having again exposed her at public sale to the highest bidder?

3d. Did not the time given for the payment of the money, confirm the sale to the defendant, and vest the property in him?

4th. Did the right of the slave legally vest in the plaintiff, under all the circumstances as above stated?

Henry, for the apellant, took the following positions:

1. That in this action, the defendant may plead property in a stranger. 1 Salk. 94. 1 Johns. Rep. 384. Gibb Rep. 127.

2. The title was in the defendant, because a day of payment was given by the Sheriff. 2 Com. on Cont. 210. Noy's Max. 105.

3. That the sale to the Plaintiff was void, because private. Conf. Rep. 551.

4. That replevin cannot be maintained, unless a forcible taking is proved. Schoale & Lefroy's Rep.

M'Millan, for the appellee, contended, that the property vested in the plaintiff, as well by the delivery of the sheriff to him, as because the defendant could not confirm the bid he made by the payment of the money; this rendered it a nullity, and the sheriff was bound to notice the next highest bid. 1 Hayw. 293.

The action may be sustained for any illegal taking. Cro. Eliz. 824. Cro. Jac. 50. C. 145—6.

Seawell, J. delivered the opinion of the court:

When one individual attempts to become "his own carver," and takes from the possession of another personal property, he is usurping an authority; and the law, to prevent the possibility of his being benefited by his own wrong, will compel him to restore the possession, and then shew the *right* he had for the exercise of this summary justice. This restoration is effected by the action of replevin, and in no case will it lie, but where there has been a taking. In all other cases, the party in possession shall retain it, till recovered by the court pronouncing upon the title. In this case, the slave is stated to have *been found* in defendant's possession: How the defendant acquired such possession, does not appear, and we must be making a case to suppose, that the defendant acquired it by a trespass. We are, therefore, of

opinion, that the rule for a new trial should be made absolute.

NOTE.—See S. C. after a new trial reported in 2 Murph. Rep. 357. See also *Wrenford* v *Gordon*, 1 Martin's Rep. 54—and the act of 1828 (1 Rev. Stat. ch. 101) which provides for bringing the action of replevin for slaves in certain cases.

LEE *vs.* WOODWARD—Page 100.

Where a testator devises a mill to one of his sons, and to another an entry of land which included the land used for a pond, the part covered by the pond passes to the first son by the devise of the mill.

This was a petition, under the act of Assembly, to recover damages on account of forty-six acres of land, claimed by the petitioner, as being overflowed by the pond of the defendant's mill. The defendant pleaded *Liberum Tenementum;* and in support of his plea, produced the will of Christopher Woodward, father of the defendant, under whom the defendant claims, as follows, viz.

"I give to Pleasant Woodward, my son, my mill and plantation whereon I now live, also three cows and calves or yearlings, to him and his heirs forever, also my riding-horse and saddle forever."

The petitioner claimed under the following clause of the same will:

"I give to my son Richard Woodward one hundred acres of land, including the Dutchman's field, also one entry of land containing three hundred and forty acres, including the old field which lieth on the South Prong of Middle creek, also one bed and furniture, also ten pounds worth in cattle, also ten pounds in specie, to him and his heirs forever."

The forty-six acres are now included in the pond of the mill devised by the first-mentioned clause of the said will;

and are included in the entry devised by the clause of the said will last mentioned.

The defendant did not offer any evidence that the mill-dam was of the height when the said will was executed, or at the death of the testator: Nor did the petitioner offer any evidence that the said mill-dam had been raised since either of these events.

The jury assessed damages for the petitioner, subject to the opinion of the court, on the foregoing statements.

Browne, for the petitioner.

In a grant, the construction is in favour of the grantee, because words are to be taken most strongly against the person using them. But in a question between two devisees, I can see neither reason nor authority for any construction in favour of the one more than the other. If they are entitled to a favorable construction, so are we; but in conflicting claims, there cannot be construction in favour of both—therefore there shall be none in favour of either, but a strict construction.

By the grant of a house or land, even *cum pertinentiis*, another house or land does not pass, unless it be parcel. Com. Dig. Grant E 9. 1 Lev 13. 1 Sid. 211.

Every where it passes as incident; it may be accepted if only convenient, and not necessary to the enjoyment. Com. Dig. Grant. E. 11. Co. Litt. 151. A. And this is in conformity with the ancient and well established maxim of law. *Expressum semper facit cessure tacitum.* e q. Feoffment by the words *dedi & concessi*, implies a general warranty; but if a special warranty is included in the deed, that rebuts the implication of a general warranty. So here, although the mill-pond might have been implied in the devise to the defendant, yet part of it being given to the petitioner in express terms, the implication ceases. Without the forty-six acres, the defendant would have the mill, as nine-tenths of the mills in the country are held, and as this very mill had been held. It would be a strange construction, to take from the petitioner what is expressly given to him—an entry of 340 acres, and give it by implication to the heir.

R. Williams, for the defendant.

No principle is better established in the construction of wills, than that the intention of the testator shall prevail. The rules by which this construction is ascertained, are reduced to no form of words, but depend upon the nature of the thing devised, and sometimes upon circumstances relative to the testator himself. In the case before the court, the subject of the devise will carry conviction to the mind as to what was the intention of the testator. "*I give to my son Pleasant Woodward* (the defendant) *my mill and plantation whereon* I *now live,*" is to be understood from words used in common parlance, a devise of not only the mill house, but also that quantity of land, which before that time was covered by the waters of the mill-pond. If this construction did not take effect, the mill would, in a high degree, be useless, and prevent the bounty of the testator, which extended equally to this defendant as to his other son Richard, under whom the plaintiff and petitioner now claims. 2 W. Black. Rep. 726. Ibid 1148. 2 T. Rep. 502. 1 P. Wil. 603, in marg. note. Ambl. 395. Cro. Eliz. 113. Cro. Car. 129. Jones 195. Cro. Jac. 104.

Per Curiam.

We are all satisfied, that the devise of the mill-pond is implied in the devise of the mill, certainly as between the two brothers, the devisees; and that the devise of the entry of land, must be taken subject to the incumbrance of leaving the forty-six acres for the purpose of a pond.

Judgment for the defendant.

BILLINGSLY, ASSIGNEE &c, *vs.* KNIGHT—Page 103.

A subscribing witness to a note, to whom it is afterwards endorsed, and who then endorses it *without recourse* and is also released by the endorsee, is a competent witness to prove its execution.

This action was tried before HALL, J. at Anson Superior Court, and was brought on a bond, payable to John Hardwick, to which William Johnson is the only subscribing witness. On the 10th day of October, 1799, Hardwick assigned the bond in the usual form to Johnson, the witness, and on the 6th day of February, 1816, Johnson assigned it to the plaintiff, in the following words, to wit, "I hereby assign over the within obligation to Hezekiah Billingsly, without any recourse back on me." To prove the execution of the bond and the assignment by Hardwick, Johnson was offered as a witness, and a release from Billingsly to him was read; his testimony was opposed by the defendant, but admitted by the court, and a verdict was given for the plaintiff. The defendant obtained a rule to shew cause why a new trial should not be granted, on the ground that Johnson was an incompetent witness. On argument, this rule was discharged, and the defendant appealed to this court.

M'Millan, for the defendant.

Though Johnson may be discharged by the special nature of the endorsement, yet he is an incompetent witness in this case, having once put his name to the note. *Walton* v *Shelley*, 1 T. Rep. 296. And though this case has been since overruled, yet it has been adopted and enforced in many of the courts of the United States. Phil. Evid. 33.

DANIEL, J. It appears from the case, that Johnson, the witness, had made such a special endorsement to the plaintiff, as to put it out of the power of the plaintiff ever to look to him for any part of the money, under any circumstances whatever; unless it should turn out to be a gross fraud and imposition, which I cannot well see could happen. But in

the present case, Johnson is released, and he is surely a competent witness, and was properly admitted to give testimony.

The circumstance of his name appearing on the bond, and that bond being negotiable, can make no sort of difference. I think, ever since the case of *Jordaine* v *Lasbrook*. 7 Term 601, the law has been settled upon this point.

SEAWELL, J. I know of but two rules by which the competency of witnesses can be tested, the one interest, and the other infamy. The rule laid down in *Walton* v *Shelley*, has long since been abolished and the competency restored to its former standard. Johnson, the witness, could only be liable in virtue of his endorsement, and being released from that, stood as indifferent as any other individual. He was properly admitted, and I am for discharging the rule.

TAYLOR, C. J. I can scarcely perceive any question to be decided in this case; for Johnson is unquestionably disinterested in the event of the suit; his endorsement never made him liable, and if it did, the release discharged him. Supposing that the case of *Walton* v *Shelley* had not been overruled, it could be no authority here; for it only decided, that a person should not impeach an instrument to which he had put his name: Johnson is not called upon to impeach this note, but to support it.

Judgment affirmed.

NOTE.—See *Ellis* v *Hetfield*, 1 Martin's Rep. 41. *Hamilton* v *Williams*, 1 Hay. Rep. 139. *Hall* v *Bynum*, 2 Hay. Rep. 328. *Johnson* v *Knight*, 2 Murph. Rep. 237. *Saunders* v *Ferrill*, 1 Iredell's Rep. 97.

COLLINS *vs.* TURNER—Page 105.

Where letters of administration are granted in the court of a county, in which the intestate never resided, they are void; and being a nullity, a petition to set them aside will be dismissed.

This was a petition, filed by Josiah Collins, in the Coun-

ty Court of Bertie, calling upon Simon Turner to show cause why certain letters of administration granted him, the said Turner, by the County Court aforesaid, on the goods, chattels, &c. of a certain Hamilton Blackburn, should not be rescinded.

Hamilton Blackburn left this country for Europe, some time about the years 1795 or 1796, constituting the said Josiah Collins his agent and attorney, and has never been heard of since. No letters of administration had been taken on his estate by the said Collins or any other person, until November Term of Bertie County Court, in the year 1813. Simon Turner, agent and attorney for the Trustees of the University of North Carolina, applied for, and obtained letters of administration on said estate, and filed a bill against said Collins, for an account of said Blackburn's *estate*. The said Collins, in his answer, acknowledged himself greatly debtor to Blackburn, but afterwards applied to the County Court of Chowan for, and obtained letters of administration on his estate, and now files his petition to rescind the letters granted to Turner, as having been improperly granted by the County Court of Bertie.

On the trial in the County Court, the justices decided that the letters were properly and rightfully granted, and refused to rescind them; from which judgment, Henry W. Long, Esq., the attorney employed by said Collins to file the petition, prayed an appeal, and entered into bond, signing himself as attorney for Josiah Collins, and the bond being filled out in the name of H. W. Long, as attorney as aforesaid.

At Oct. Term. 1815, of Bertie Superior Court of Law, this case coming on to be heard, the presiding Judge ordered the same to be transmitted to the Supreme Court, for their determination, on the following points, viz.

1st. Whether or not, the County Court of Bertie had authority, or could properly grant letters of administration on said Blackburn's estate, it being admitted that said Blackburn was an inhabitant of, and resided in the town of Edenton, and county of Chowan, before, and at the time of his departure from this country.

2d. Whether the court would interfere, and set aside the aforesaid letters in favor of the petitioner, when it evidently appears that the said petitioner is not the proper person to whom administration should be granted?

3d. Whether the appeal was properly taken, the bond being filled out in the name of Henry W. Long, as attorney for Josiah Collins, and signed by him, said Long, as attorney as aforesaid, without producing any authority for doing so--the defendant, Turner, having moved to dismiss the appeal, on the aforesaid grounds.

DANIEL, J. delivered the opinion of the court:

Three points are submitted for the opinion of this court. On the first, we are of opinion, that the County Court of Bertie had no authority to grant the letters of administration to the defendant, or any other person, as the intestate, Blackburn, never was a resident of that county: and the act of Assembly of 1789, c. 23, § 1, requires letters of adters of administration to be granted by the court where the person dying usually resided.

Secondly. We think, as the letters of administration granted by the County Court of Bertie were void, and not voidable, there was no necessity to trouble the courts with the petition, seeking to set aside that which in law is a nullity.

If adminisiration be granted by an incompetent authority, as by a Bishop, when the intestate had not *bona notabilia*, or by an Archbishop, of effects in another province, it is void. Hard. 216. Tol. 90.

For the above reasons, we are of opinion the petition should be dismissed. It is unnecessary to decide the last point.

NOTE.—See *Smith* v *Munroe*, 1 Iredell's Rep, 345.

FERGUSON *vs.* M'CARTER—Page 107.

If the appellee in the Superior Court suffers the cause to go to the jury, it is an implied waiver of any objection, arising from the defectiveness of the appeal bond; and the appellant in such case may proceed in the suit. But the court may, in their discretion, upon a proper case, require further security.

This cause is taken to this court by appeal, on the following statement:

The cause originated before a justice of the peace; there was an appeal to the County Court, and an appeal from the County Court to the Superior Court. After the jury was charged with the cause in the Superior Court, the plaintiff's counsel discovered that the appeal bond given by the defendant, from the County to the Superior Court, was defective; and moved the court that the cause be dismissed: The court did accordingly dismiss the cause. The questions submitted to this court are, Whether the court acted properly in dismissing the appeal after the cause was submitted to the jury? And if they should be of opinion that the cause was improperly dismissed, whether the defendant should not be placed in the same situation that he was before dismissal—or what will be done with the cause?

SEAWELL, J. delivered the opinion of the court:

The act of Assembly allows every plaintiff or defendant the right of appeal from the County to the Superior Court; but it requires, for the *benefit* of the appellee, that bond and security should be given. If an appeal has been allowed, and the appellant has omitted to give this security, it is in the power of the appellee to have the appeal dismissed; but it being for *his benefit*, he may, if he chuses, waive it—and this waiver may be *express* or *implied*. When it is express, as by entry on the docket, there the court above ought to entertain the appeal; if *implied*, as by *suffering* the cause to *go to the jury*, he ought not afterwards to be permitted to avail himself of an advantage, which, from *his conduct* he

has consented to abandon. The cause, therefore, should be remanded, and the appellant permitted to proceed in his defence—leaving it to the discretion of the Judge, upon a proper case, to require further security.

NOTE.—See acc. *Smith* v *Neil*, 1 Hawks 14.

WILLIAM SHEPPARD'S HEIRS *vs.* STEPHANUS SHEPPARD.
Page 108.

A colour of title, without seven years continud possession, will not entitle the plaintiff in ejectment to recover, even against an intruder.

This was an action of ejectment to recover the possession of the premises of which defendant was in possession. The jury, by direction of the court, found for the plaintiff, subject to the opinion of the court upon the following facts: That the premises were patented by Barfield, 21st April, 1764; that Benjamin Sheppard, in May, 1792, conveyed the same to the ancestor of the lessor of the plaintiff, who entered thereupon and died within seven years; that after his death, the lessors (the children of the deceased) being infants, were removed by Benjamin Sheppard; the personal property was also removed, and soon thereafter Gardner Sheppard, the brother to the deceased, entered upon the premises then unoccupied. After his removal, which was about ten years ago, the present defendant, another brother, also entered, and has continued in possession. No other possession is proven by the plaintiff, or any other title given en in evidence, when the court directed the question to be transmitted to the Supreme Court.

Mordecai, for the plaintiffs.

It is not intended to controvert the rule so long established, that the plaintiff in ejectment must recover on the strengh of his own title; but we insist that the evidence given by the plaintiffs in this case, was sufficient to authorise the jury to presume that they had title.

If the plaintiff prove that A was in possession of the premises, and that his lessor is heir to A, it is *prima facie* sufficient; for it shall be intended that A had a seisin in fee, till the contrary appears. Bul. 103. In *Allen* v *Rivington*, 2 Saund. 111, "the matter of law was never argued, because it appeared upon the record, that the lessor of the plaintiff had *priority* of possession, and there was not any title found for the defendant, and the priority of possession alone gives a good title to the lessor of the plaintiff, and all the world, except the heir of the disseisor."

In *Bateman* v *Allen*, Cro. Eliz. 437, it is said, "forasmuch as it is not found in the verdict that the defendant had the primer possession, nor that he entered in the right, or by the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful."

Every presumption ought to be made against a bare intruder. He who has had possession should be presumed to have had it rightfully, and not be bound to deduce it minutely, in order to expel every vagabond who thinks proper to usurp it.

DANIEL, J. delivered the opinion of the court:

The ancestors of the lessors of the plaintiffs did not derive any title from the patentee, or from any person claiming under him: They claim by virtue of a deed made and executed to their ancestor by a certain B. Sheppard, dated in May, 1792. It is admitted by the case, that neither their ancestor, in his lifetime, nor themselves since his death, have had a seven years continued possession of the premises in question; and we are therefore of opinion, that the deed of 1792, accompanied with a possession short of seven years, did not ripen into such a title, as authorises the present lessors of the plaintiffs to recover in this action.

Judgment for the defendant.

NOTE.—See *Jones* v *Ridley*, 2 Car. L. Repos 397, and the note to *Strudwick* v *Shaw*, 1 Martin's Rep. 34, and to the same case in 1 Hay. Rep. 5. See also *Duncan* v *Duncan*, 3 Ired. Rep. 317.

JONES *vs.* JONES—Page 110.

Where a judgment is recovered at law on a gaming bond, equity will not interfere, if no fraud was used in obtaining the judgment, or the complainant was not prevented from making a defence at law.

SEAWELL, J. delivered the opinion of the court:

It is not sufficient to shew that injustice has been done; but that it has been done under such circumstances as will warrant the interference of a court of Equity. For if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a Court of Equity cannot take on itself to enter on it again. These rules are established for the purpose of fully examining every matter of dispute, and putting an end to litigation, and are presumed to be competent for that purpose. And it is more important that an end should be put to litigation, than that justice should be done in every case. The truth is, that through the inattention of parties, and other causes, *exact* justice can be very seldom done—and in saying this, I am warranted by the high authority of Sir John Mitford.

Let us, then, see what are the circumstances of this case. The bill charges, that the defendant, with divers persons, entered into a combination to win money from the complainant; that he lost a considerable sum with defendant, for which he gave his bond, and that suit was brought upon the same, and judgment recovered. Now the bill does not complain of any fraud practised, or that the complainant was in any manner hindered from making full defence at law. And if full defence was made, and the matter was fully tried, that is a good reason why Equity should not interfere; for, in courts of co-ordinate jurisdiction, there is no reason to suppose one will act more correctly than another—and at that rate there would be no end to controversy. But if the complainant had an ample opportunity at law to defend himself, and would not then embrace it, there is less reason, inas-

much as he is now making that the ground of a new suit, which it was once in his power to have used as effectually as it can avail him in this court; and which if employed, and true, would finally have settled the matter in dispute: To such a complainant, Equity will turn a deaf ear.

It has been said, however, that the bill charges a *combination*, and that the jurisdiction of a court of Equity is concurrent in those cases. But still the question recurs, as it was cognizable at law also, why was not defence made there, or accounted for in some manner? It is true, that in cases where courts of law cannot take effectual cognizance, as in cases of complicated accounts, where the party did not make defence because on account of the impossibility of doing it effectually—many of the items resting in the personal knowledge of the adverse party, or the balance depending upon the production of books and accounts, which a court of law could not order; or in cases where a party has improperly obtained an advantage at law—as by a verdict through fraud, and which it is unconscientious to avail himself of, Equity will step in and lend her aid—but such cases must be made by the bill, and not stated in argument. Now, in this case, for aught that appears by the bill, every thing *was*, or *might* have been discussed in the trial at law, with the same advantage, and to the same extent, that it can here, and the result have been the same. A bill for a new trial is watched in Equity with a jealous eye. A court of Equity must not only see that injustice has been done, but that there is no other *complete* remedy which the party can have; and that he has not been reduced to that situation by his own neglect. This bill does not pretend to make the difficulty of proof a ground for coming into this court; but charges, that it is against conscience that the defendant should have the benefit of a judgment founded on a gaming consideration. This court has already decided, in the case of *Hodges* v *Pitman*, that money lost fairly cannot be recovered back; and if the *law* would not raise a promise to refund it, the rule, to be consistent, must say that Equity will not step forward to prevent its payment—or, which is the same, to restrain a legal obligation to enforce it.

In whatever view, therefore, I consider the case, I think the injunction should be dissolved. This case, however, steers clear of the enquiry, whether Equity will relieve against the payment of money on a gaming consideration; as the application is too late, when there was once a fair opportunity of full defence.

NOTE.—See *Taylor* v *Wood*, 2 Hay. Rep. 332, and the cases referred to in the note.

LONG *vs.* MERRILL AND BEARD—Page 112.

A court of equity will not interfere where the ordinary rules of law afford complete and adequate relief; for the object of equity is to supply the deficienies of the law. Therefore where a person has a right to a ferry, and another sets up a free ferry, in the neighborhood, whereby the owner of the ferry loses his profits, an injunction will not be granted to stay the free ferry, because a court of law may place the owner of the ferry *in statu quo*.

SEAWELL, J. delivered the opinion of the court:

The complainant files his bill in the court of equity of Rowan county, stating that he has a right to a ferry on the Yadkin River, and that the defendants had attempted to obtain a ferry on the same river, near the complainant's, by a petition to the county court; and that upon the determination of this court against the petitioners, they have continued to set over persons, horses and carriages, toll free, by which the complainant is injured in the loss of profits. The bill then charges, that, the complainant has commenced his action at law, and prays an injunction. To this bill is the affidavit of complainant, verifying the charges set forth in the bill; whereupon the court grants the injunction, and from which the defendants appeal to this court. And the first necessary enquiry is, whether the case made by the complainant is, if true, such a one as requires the assistance of a court of Equity? And here, I think it may be safely laid down as a general rule, that a court of equity will interpose

in no case where the ordinary rules of law afford a *complete* and adequate relief; for the very end of the institution of a Court of Equity is, to *supply* the *deficiencies* of the law.

The ground which the complainant makes for coming into this court, is, the *loss of profits;* but no *difficulty* in obtaining that loss is stated in the bill—and though we may *suppose* it probable, that there *may* be some in ascertaining the number of persons set over, yet the complainant does not allege it, or seek to discover it, but simply prays an injunction against setting over any others. As, therefore, the only injury or inconvenience which he alleges, is one which his action at law is completely capable of encountering and giving relief against, by adequate damages, for aught he alleges, I see no reason for the interference of this court: For it cannot be said to be essential to the relief or assistance of the comptainant, that this court should award the injunction prayed for. When I say adequate relief, I mean repairing the injury complained of, by placing the party in *statu quo.* And the many cases cited by the complainant's counsel, in which injunctions were allowed, all went upon the ground, that a suit at law would not *restore* the party to his loss, but could only give him *money* in lieu thereof. If, therefore, the complainant *had* exhibited his own title, and *had* complained of a conduct in the defendants, which, if true, *was* both a *damnum & injuria,* I should still have thought, from the case made by the bill, there was no necessity for his calling upon a Court of Equity.

It is not necessary to give any opinion upon the other points raised in the argument, being clearly against the complainant upon the first.

Note.—See S. C. post 256, and in 2 Murph. Rep. 337.

SPENCE *vs.* YELLOWLY—Page 114.

Where the plaintiff claimed a slave under a fraudulent deed from the owner, who left the State, and afterwards the defendant purchased up a small account against him, on which he sued out an attachment and levied it on the slave, who was sold under it, and the defendant became the purchaser; *it was held* that his title was good, for that he must be considered both creditor and purchaser.

Detinue for a slave. John Boon, the former proprietor of the negro in question, made a fraudulent conveyance of the negro to the plaintiff his mother. The defendant afterwards obtained a judgment against the said John Boon, and caused an execution to issue thereon, which was levied on the said negro, and at the sale thereof became the purchaser.

When the officer was crying the negro, a person made a bid. The defendant asked him if he was his enemy. That his object was to purchase the negro for the benefit of the debtor's wife. That, in consequence of the conversation aforesaid, the person desisted from bidding. That the value of the negro was, at the time, 350 dollars; to which amount the said bidder would have bid. He was knocked of to the defendant at $150 01.

The defendant has, since the verdict, conveyed the negro to the wife of John Boon.

It was the object of the defendant, in speaking to the bidder as aforesaid, to prevent his further bidding, and to get the negro at an under value, and as low as possible, for the benefit of the debtor's wife, who had been abandoned by her husband and left in a destitute situation.

The said defendant, Yellowly, purchased from Robert Sherrod an open and unliquidated account of $9, against said Joh Boon, after the said John had left the State, and removed to the State of Kentucky. Defendant engaged the constable to levy an attachment, grounded on the said account, on the said negro Jess, who was then a runaway, and at the defendant's house, which was accordingly done, and

the negro sold *under* it, as aforesaid. During all these proceedings, the said John Boon was out of the State, &c."

The jury, under the direction of the court, found a verdict for the defendant.

SEAWELL, J. We are all of opinion, that there appears nothing to impeach the honesty of the defendant's title, but that he stands in the shoes of both a creditor and purchaser. The plaintiff's deed being fraudulent, cannot, therefore, have any effect. The rule for a new trial discharged.

DEN ON DEM. OF THE HEIRS OF FARQUHAR CAMPBELL *vs.* ALEXANDER McARTHUR—Page 115.

A person, who, being a prisoner of war in July 1777 and refusing to take the oath of allegiance, conveyed lands to his son, then a resident of this state, might lawfully do so, notwithstanding the confiscation acts passed in 1777, 1779 and 1782.

The confiscation acts have no retrospective operation, except such as is confined to the property of the enemy. So that if an estate has been conveyed from one enemy to another, it is still within their operation; but if from an enemy to a citizen, it then has the guaranty of the constitution.

There is no principle in the common or statute law of this state, nor in the law of nature, which forbids any individual, upon the formation of a new government, to dispose of his property, and to remove his person.

The land in question was granted by the Crown to Thomas Locke, by patent, bearing date Feb. 20, 1735.

In 1772, the same land (by mesne conveyances) vested in Neill M'Arthur, in fee-simple.

In 1775, the said Neill M'Arthur took up arms against this State, and joined the public enemies thereof.

In 1776, being in arms, and adhering to the enemies of this State, he was taken prisoner, and carried to Fredericktown, in Maryland, where he was confined as a prisoner of war.

In April, 1777, he solicited permission from the Congress of the United States, to come to this State, for the purpose (as he professed) of taking the oath of allegiance to this

State. Congress granted him permission, on his giving security that he would return to Fredericktown in three months, unless on his coming to this State he took the oath of allegiance to this State. John M'Kay, the witness who testified to these facts, became security for his return, according to his parol.

Under these circumstances, the said Neill M'Arthur came into Cumberland county, where he had formerly resided; and on the 4th July, 1777, he conveyed the land in question to his son Archibald M'Arthur, an infant, in consideration of natural love and affection, and of five shillings.

In July, 1777, the said Neil M'Arthur returned according to his parol, to Fredericktown, as a prisoner of war, without having taken the oath of allegiance to this State, and having refused to take the same while here.

In July Term, 1782, of Cumberland County Court, the executors of Robert Hogg, obtained judgment against the said Neill M'Arthur, under and by virtue of an act of the General Assembly, passed in 1782, c. 6, § 19. Execution issued thereupon, which was levied on the land in question; and the same being sold by the authority of such judgment and execution, became vested by such mesne conveyances, in the aforesaid Farquahar Campbell.—Neill McArthur herein mentioned, is the same person described by that name in the acts of the General Assembly, passed in the several sessions of 1779, c. 2, and in 1782, c. 6.

The questions submitted to the consideration of the Supreme Court, for their decison, are:

1. Whether the aforesaid acts of 1779, c. 2, and of 1782, c. 6, did absolutely confiscate the real estate of the said Neill M'Arthur, so that the forfeiture took effect from the 4th of July, 1776?

2. Whether the said Neill M'Arthur, having taken up arms, and joined the public enemies of this State and of the United States, and being a prisoner of war, at the time of the deed of the 4th July, 1777, to his son Archibald McArthur, could make a valid conveyance in law of the lands in ques-

tion, to his said son, by virtue of the 6th sec. c. 3, of acts of first session of 1777, or by any other authority in law.

Should the opinion of the Supreme Court be in favor of the plaintiffs, on both, or either of these questions, then judgment to be entered for the plaintiffs. Should the court be of opinion for the defendant, on both questions, then a new trial to be granted.

SEAWELL, J. delivered the opinion of the court:

The case finds, that Neill M'Arthur, in 1775, was taken prisoner of war by the American People, then in resistance to British authority, and that in July, 1777, he being then a prisoner, was permitted to return, upon security, from Maryland to this State, for the purpose of taking the oath of allegiance; or, in case of refusal, to return back to confinement: That upon his return to this State, he declined taking the oath, and on the 4th July, 1777, conveyed the lands in question to his son, in consideration of natural love and affection and five shillings, and returned back to captivity according to his engagement; that he is mentioned by name in the acts of confiscation; that after the year 1782, in Cumberland county, a judgment was recovered against him, upon a petition, in conformity to the act of Assembly respecting claims against persons who had forfeited their estates, upon which, execution issued, and the land in question sold to plaintiff's ancestor. And the question presented for this court to determine, in substance, is, whether the acts of confiscation, passed in the year 1777, 1779 and 1782, for they contain the substance of all the acts, have the effect, under the circumstances of this case, to render inefficient the conveyance to the son? And this leads to an examination of the acts of 1777, exteding the right of disposition to such as were in the country who should refuse to take the oath of allegiance.

It may, however, not be amiss, first to strip this case of a feature which was ascribed to it in the argument—namely, that Neill M'Arthur, by joining the enemies (as they were called) of the country, committed treason, and that the conviction, (as the acts of confiscation have been called) re-

lates back to the time of the offence, and will avoid all intermediate conveyances. Now the first act upon the subject of treason, passed in April, 1777, previously to defining the offence, expressly exempts prisoners of war from allegiance; so that the right which the sovereignty of the country possessed to confiscate, must, if it be admitted to exist, depend upon a broader basis than the peculiar conduct of the party to be affected. This right did exist, and depended upon the great principle of *necessity*—that the Sovereign Power of the State may act as it pleases with the effects of its *enemies*; not on accounts of traitorous conduct in adhering to their lawful Sovereign, and fighting his battles; but upon the principle, that each of the contending parties may rightfully do all in his power to weaken his adversary, which is supposed to be effected by stripping his subjects of their property, and rendering them less able to contribute to the support of their Sovereign's Government. The acts of confiscacation are not to be considered as a conviction by the grand inquest of the nation, as an act of attainder might be; but as the exercise of a mighty power by the Sovereignty of the country to weaken an opposing adversary.

If we, therefore, attend to this radical distinction, we shall evidently perceive the impossibility of the acts having any retrospective operation that is not confined to the property of the enemy. If an estate has been conveyed from one enemy to another enemy, it would still remain within the control of this power; but whenever it has *passed* to the hands of those who belong to the sovereign, the property then has the guaratee of the constitution.

Let it then first be asked, what law, either in the statutes, or common law of North Carolina, or in the law of Nations, prohibited those who, before the 4th of July, 1776, had good title and could convey, from conveying afterwards, although they did refuse to become members of the new Government? No such statute was passed, nor is it believed to be found in any principle of the common law. But from the cases cited from Vattel, it would seem as if this does exist by the great laws of nature, supposed to be understood and adopted by

every formation of civil society at its commencement—that whenever a new kind of government shall be adopted, those who acquire property upon the faith of the old one, may dispose thereof, and remove their persons. If this condition were not the case of every inhabitant of the State, upon the change of government, from the principles last stated, let us see whether they have not, in effect, been recognized by the acts of Assembly; and this brings us to the examination of the several acts we before proposed.

The act of April, 1777, contains a clause that persons of a particular description, namely, officers of the late King, merchants and factors who had traded with Great Britain or Ireland, within ten years, should be *compelled* to take the oath of allegiance (this was not required of Neill M'Arthur, for he was a prisoner of war) they were to be cited for that purpose; and on refusal, were to depart, and in *case of departure*, might lawfully sell Now what was the object and policy of this law? To favor one particular *description* of men? Sulely not. What then? Why, these sort of men, most of them Scotchmen who had smarted for rebellion, were *suspected*, and the country thought it was interested in getting them away, lest they might instil principles of loyalty to the King. The design, therefore, of the clause, and indeed great part of the act, was to bring this matter to the test, and to get rid of such persons, without its ever being thought of as a provision to *enable* them to sell. And, indeed, upon looking at the act, it would seem that this was put in through caution, lest the *refusal* to take the oath, might disqualify them from selling. Let it be remembered, M'Arthur being a prisoner at war, was not held to allegiance, or required to swear.

The act of Nov. 1777, next is passed; in the first part of which, all the act of April is re-enacted, and the act then proceeds to direct that every body should take the oath of allegiance, or depart, except permitted by the County Courts to remain. Those who *remain*, after refusing to take the oath, are *restrained* from conveying their property for a greater period than one year, and are declared to forfeit all,

in case they remove without permission. They were, therefore, recognized as persons capable of holding lands, and are not considered as affected by the change of government, in any other manner than should be *prescribed* by law.

The act of 1779 is then passed, confiscating the estates of those who, on the 4th of July, 1776, were absent from the United States, or who since that time withdrew themselves, extending the operation back to the 4th of July, 1776. And it is remarkable, that in the 14th section of the act it represents, that many persons who had refused to take the oath of allegiance, were compelled to leave the State in consequence of the acts of April and November, 1777, and had omitted to sell their lands and appoint attornies, "whereby many lands of the persons so described, are yet undisposed of, and *still continue to be and remain to the use of the same*," that all such lands, not disposed of *bona fide*, for a valuable consideration actually paid, shall be forfeited to the State. This act then contains an explicit declaration, that those who had refused to take the oath and departed, still retained their estates, and is equivalent to saying they were not *de facto* affected by the change of the government. If they did retain their property, they also retained the right of disposing of it, unless forbidden by law. This was only the case with those who remained by permission, after refusing to qualify, and the act passed *after the 4th of July*, 1777, namely, November, 1777.

Then as to the consideration. A citizen of the country, who has committed no crime nor come within the operation of either of the acts, claims title to the lands in virtue of a conveyance, which he alleges, passed to him the estate at the time of its execution. The only inquiry then is, did the estate then pass? What was there to hinder it? The acts of confiscation, respecting the *payment* of the consideration, had not then passed. No question about a fraudulent conveyance to defeat creditors, is now made. And the father being about to abandon his country, we can readily account for his conveying *that* he could no longer enjoy himself to his child, whom he was bound to provide for.

If policy, however, is to have any share in determining what kind of contracts were effectual, it would seem, upon the very principles of the right to confiscate, that those for which no valuable consideration was given, were most to be favoured, inasmuch as they impoverished the subjects of the enemy. But it is far from being believed, that the *kind* of consideration has any sort of influence. The only question must result in this, was there such conveyance as the law recognized to be valid and to pass the estate? If there was, and the lands *then* became vested in the defendant, it required an arm more powerful than the legislature, to wrest it from him, without any misdeed.

I am of opinion, therefore, upon every ground I can consider the case, that there should be judgment in favour of defendant, and that consequently the rule for a new trial be made absolute. It has however been said, that the ordinance of the convention in 1776 prevented these persons from disposing of their estates. That ordinance is confined to persons *in* the state, so far as it prohibits a conveyance; and as to those out of the state, it is expressly left to the future legislatures to make regulations respecting them.

HUNTER *vs.* HUNTER'S ADM'R—Page 122.

Where an administrator is fixed with assets by the finding of a jury, and execution issues on which *nulla bona* is returned, the next proper process is a *sci. fa.* suggesting a *devastavit*, and not a special *fi. fa.* or an action of debt for a *devastavit* may be brought instead of the *sci. fa.*

This was a motion for a special *fieri facias* against the proper goods and chattels of the defendant, in the event of the sheriff not being able to find goods of the intestate, sufficient to satisfy the judgment; and was grounded upon a verdict and judgment fixing the defendant with assets, and the return of *nulla bona*, by the sheriff.

It is referred to the Supreme Court to determine whether such execution shall issue, or whether the plaintiff is required to take his *scire facias.*

RUFFIN J. The practice in such cases as that stated in this cause, has been different in the different parts of the State; and I think that it is well it has been brought here, so that it may be settled. It is true, that the defendant cannot plead to a *scire facias*, any thing that he plead or might have pleaded to the original action. This is the chief argument relied on by those who wish the special *fieri facias* to go on motion, but does not satisfy me, because it does not meet the whole question. There may be matters arising after judgment, which could form a good defence, and the defendant ought to have an opportunity of showing them. Where such are alleged and disputed, ought the *court* to decide upon them and thereby pass upon a disputed fact? I should think not. And though there might be cases, where the court would do no injustice by issuing the special *fieri facias*, in the first instance, yet there are others where much inconvenience might follow to the defendant. I am led to this conclusion the more readily, by considering that the plaintiff, on the other hand, suffers very little hardship; only that of the delay of two terms; and has it also in his power to obtain remuneration for that delay, by the way of interest, by bringing *debt for a devastavit*, instead of the *scire facias.* In order, therefore, that the parties may be fully heard on both sides, and that the practice may be uniform, I am of opinion, that the special *fieri facias* ought to be refused on this motion, and the plaintiff have leave to issue his *scire facias.*

NOTE.—See *Burnside* v *Green*, 2 Hay. Rep. 112 and the note thereto.

LEGGET *vs.* BLOUNT—Page 123.

In an action for a malicious prosecution, whether there was probable cause, is a question of law, but the facts which go to show it, must be ascertained by the jury.

This was an action for a malicious prosecution, in taking out a State's warrant against the plaintiff and one Joseph Garret, charging the latter with perjury, and the former with subornation of perjury.

The plaintiff introduced a paper writing, under the hands of the two justices who examined the parties named in the warrant; whereby it appeared, that one of the justices thought the parties ought to be bound over for trial, and the other thought differently; and therefore they united in discharging them. And on this paper the plaintiff rested, as proving malice and want of probable cause. But the court required other proofs to be given of both these grounds of the action.

After the plaintiff had examined witnesses for these purposes, the defendant introduced several witnesses and depositions to establish a probable cause that the subornation of perjury had been committed by the plaintiff; and on his part, it was insisted, that the defendant should be restricted to such testimony as was laid before the Magistrates; but the court was of opinion, that the defendant ought not to be so restricted. Many witnesses were then examined on both sides as to the probable cause, and the plaintiff moved, that the whole case should be left to the jury, to decide whether there was probable cause. But the court was of opinion; and so declared, that, whether there was probable cause or not, was a question of law, to be decided by the court. And there being, in the opinion of the court, probable cause for suing out the warrant, the jury were instructed to find a verdict for the defendant, which they did.

A motion for a new trial, on the part of the plaintiff, was

made and overruled. Appeal. The case was tried before TAYLOR C. J. at Chowan Superior Court.

RUFFIN, J. delivered the opinion of the court:

Whether there was probable cause for suing out the warrant, or not, I think is a *question of law*, after the facts are admitted or ascertained; that is, the court shall, upon a special verdict, give judgment; or shall say, after a general verdict, whether sufficient appears on the declaration, to entitle the plaintiff to judgment. 1 Term Rep. 544. But the court cannot say to the jury, that the court is of opinion that probable cause *has been proved*, because that clearly involves an enquiry into the *truth* of the facts contested by the parties, and the credibility of the witnesses, which is the peculiar province of the jury. In other words, I think it would have been correct to say to the jury, if they *believed* the witnesses, probable cause had been made out; and as the *whole case* was passed on by the court, I think there must be a new trial.

Let the rule be made absolute.

NOTE.—See *Plummer* v *Gheen*, 3 Hawks 66. *Cabiness* v *Martin*, 3 Dev. Rep. 454.

JONES *vs.* MASON—Page 125.

A court of equity will not proceed against an infant, unless defended by a guardian *ad litem;* and the court cannot appoint a guardian for an infan out of the jurisdiction of the court.

As a court of equity acts *in personam;* it cannot dispense with the personal service of process, in cases not provided for by statute. Hence it will not proceed on a bill to foreclose a mortgage, where all the defendants are infants and reside in an other State.

The defendant in this case, was, at the time of filing the bill, a resident of the State of Tennessee, and publication at the last term was ordered and duly made. Since that term,

the defendant died, leaving his children infants, who are his heirs at law. The bill is to foreclose a mortgage, and the infant heirs reside in Tennessee. It is referred to the Supreme Court to determine, whether the court can appoint a guardian to answer? And if not, whether the complainant can proceed further, and in what manner?

RUFFIN, J. delivered the opinion of the court:

We do not see any remedy for the complainant in this case. A court of equity will not proceed against an infant, unless defended by guardian; and we cannot appoint a guardian to defend, for a person not within the jurisdiction of the court. Moreover, this court acts *in personam*, and cannot dispense, therefore, with a personal service of process on the defendant, unless expressly authorised by some positive Statute; and the case stated, is not provided for by any of the acts of Assembly regulating the proceedings in equity against absconding defendants, or those who reside beyond the limits of North Carolina. The motion for the appointment of a guardian for the defendants is, therefore, refused, as well as an order that they should appear before process actually served.

CARVER AND OTHERS *vs.* MALLET AND OTHERS—Page 126.

In equity, the deposition of a witness, who is dead, which has been once read upon the hearing of a suit, may be read again though taken before a single person.

This case was sent to this court from the equity side of Cumberland Superior Court, to obtain an opinion on the question, whether the deposition of Robert Rowan, taken as evidence in the cause, ought to be read. The facts were, that it was taken before a single person, but had been read many years ago in the hearing of the court, at which time

the witness was dead. If the deposition is disallowed, the evidence must be lost.

DANIEL, J. I am of opinion, that the deposition, having once been read on the trial of this cause, it is now too late to enquire whether it was taken regularly or not. It is presumed to have been properly taken, or it would not have been made use of on the former trial: I think there are some instances where a deposition, taken by one commissioner, may be read; as by the consent of parties, the special order of the chancellor, &c. It does not follow, that the one now before the court may not be of that description; and as the party may otherwise lose the testimony, we think it ought to be read.

NOTE.—See *Knight* v *Kennedy*, 1 Martin's Rep. 37; *Rutherford* v *Nelson*, 1 Hay. Rep. 105. *Collier* v *Jeffreys*, 2 Hay. Rep. 400.

At July Term, 1817.

DEN ON DEM. OF FITZRANDOLPH *vs.* NORMAN AND OTHERS—Page 127.

A grant may be presumed from great length of possession, although no privity can be traced between the successive tenants. And, in such a case, a colour of title for the land, as to part of the time, may be offered to the jury as a circumstance.

The possession of a part of a tract of land, is possession of the whole claimed by a deed, where there is no adverse possession or superior title.

The act of 1791 (1 Rev, Stat. ch. 65, sec. 2) making certain possessions valid against the State, does not affect the common law principle of presuming a grant.

The lessor of the plaintiff claimed under a grant from the state, for 640 acres of land, bearing date the 22d September 1815.

The defendants relied upon length of possession, which they proved as to part of the land, from the years 1780 and 1782. From the former period, claiming under a will; from the latter, under a deed, calling for 1008 acres, but which proved, on a late survey, to be only 906 acres. They also proved, that various persons were in possession of part of the land, from the year 1769, but without any colour of title; between whom however, and the defendants, and those under whom, they claim, no connection or privity appeared to have existed.

It was given in evidence, that a large building had formerly been erected on the land: That there are yet the ruins of a palace and the appearances of a former general cultivation.

A deed to one Baker, bearing date in 1754, and a patent to Rowan, granted in 1735, called for Brompton, the name of the place in dispute. The defendants' deed calls for Baker's line. The defendants rested no part of their defence upon the act of 1791, for quieting ancient possessions.

It was further proved, that the clerk's of Bladen, the coun-

ty in which the land lies, was destroyed by fire in the year 1768 or 1769: That the defendants' deed when written was drawn from an old paper writing; but whether with or without a seal, was not known.

The cause was tried in Bladen Superior Court, before HALL, J. who instructed the jury that the length of possession, according to the evidence, warranted the presumption of a grant. The jury found a verdict for the defendant, and the plaintiff, upon his motion for a new trial being overruled, appealed to this court. The questions referred here for decision, are

1st. Was it competent for the defendants to go into evidence of possession, prior to 1780 and 1782, the commencement of the only paper titles they exhibited?

2. As the defendants did not claim under, or bring themselves within the act of 1791, ought the possession of part to be considered as the possesion of the whole?

3d. Was the length of possession proved sufficient to warrant the presumption of a grant?

4th. Was it proper to set up a colour of title without having shown that the land had been granted, except under the act of 1791?

I. Wright, for the plaintiff.

The lessor of the plaintiff claimed under a grant from the State of 640 acres of land, bearing date 22d September, 1815.

The defendants having failed to produce a grant, or to account for the loss of it; and being unable to bring themselves within the act of 1791, entitled "An Act for quieting ancient Possessions," relied on the length of their possession, as affording evidence, warranting the presumption of a grant. It appears from the record, that a part of the premises were reduced to possession in the year 1769: that the defendats' possession, or theirs under whom they claim, commenced in the year 1780. They claim under a will from that period, and from the year 1782, under a deed: that there was no connection or privity between the possession of 1769 and that of 1780 and 1782: that they claim 1008 acres of land,

whereas a small part thereof only has been reduced to possession. Hence has arisen a question which I deem very material in considering this case, viz. Is possession of a part, in this case, to be considered as possession of the whole,—as the defendants did not claim, nor bring themselves, within the act of 1791?

Lord Mansfield, in treating of the doctrine of presumptions as reported in the case of *Bridges* v *the Duke of Chandos*, 2 Burrows, says, "There are two kinds of presumptions. One a presumption of law, not to be contradicted; the other a species of evidence:—which latter, requires some ground to stand upon—something from whence it is to arise."

Let us examine the ground of presumption, in this case, in order to ascertain to what extent it can be supported, and also for the purpose of affording a proper solution to the preceding question. In ordinary cases, as where a patentee sets down on a tract of land, and only improves a small part, he is, according to the decisions which have obtained in this State, considered as in possession of the whole; because the lands have been ascertained.

The patent which is of record notifies conflicting claimants of the extent of the patentee's claim; it is the foundation of his title; and to enjoy the fee simple fully, it is indispensable that an actual possession of a part, should be considered as possession of the whole. In the present case, possession is considered the foundation of the defendant's title; and if the presumption arising therefrom, is extended beyond the limits thereof, the rule as laid down by my Lord Mansfield is violated, inasmuch as there is nothing to support the presumption. The extent of the defendant's claim, whilst possession is considered as the best evidence of title, can only be ascertained by the possession. The reasoning which would lead them beyond their possession, would leave their claim at sea, undefined in character and extent. It seems to me that it might, with equal propriety, be contended, that a grantee is not restricted by his grant, or that a corporation is not confined by its charter, as to say that presumption in this case can be extended beyond possession.

Perhaps some light may be thrown on this subject by recurring for a moment to prescriptive rights. It will hardly be denied that those rights, as regards their extent, are only to be ascertained by the manner in which they have been enjoyed. A right of way, for instance, if disputed, can only be established according to the manner and extent in which it has been enjoyed. See 2 Bac. Ab. Wil. ed. tit. Evidence, let. H. p. 660. 6 East, *Beasly* v *Shaw*, p. 208 to 214. 7 East. *Wild* v *Hornby*, p. 195 to 200. And on the same principle, the extent of the presumption in this case is only to be ascertained by referring to the possession which gives rise to it. It is the enjoyment of that possession,—the exercise of acts of ownership, excluding others from the participation of the profits,—that originates the presumption and gives it its only support. But let us for a moment extend the presumption beyond the bounds afforded by possession, in order to embrace wood lands, not circumscribed by marked lines, exhibiting no evidences of appropriation,—never reduced to possession,—and are we not compelled to acknowledge, that the presumption is forced—that it is eccentric—and cannot legally exist? Again: it does seem, that it might, with equal propriety, be contended, that he who is in possession of a lot in the city of Raleigh, is in possession of the city, or that he who is in possession of a pew, is in possession of the whole church, as to say, that possession, in this case, is possession of the whole.

But, in order to try the doctrine of presumption, in application to this case, let us for the moment reverse the order of things, and suppose the plaintiff, instead of resorting to his action, had taken possession of all the lands unoccupied by the defendants, would the defendants have been able to eject the plaintiff? And this will lead to the consideration of the will of 1780 and their deed of 1782, on which the defendants may possibly rely to swell presumption coextensive with their claim. It appears from the record, that defendants' title, if extended in such a way as to cover all the premises claimed, must arise first, from possession; secondly, from the will and deed. Allowing for the moment, that the

possession as set up, warrants the presumption of a grant coextensive with the possession, and the defendants, now considered as plaintiffs, could avail themselves as effectually in supporting their declaration in ejectment by giving in evidence their possession as by exhibiting a grant, yet as the plaintiff is only in possesion of that part of the premises which the defendants have never reduced to possession, and as they must prove the plaintiff, who in the case supposed would be defendant, in possession of the premises contained in their declaration, consequently they could not succeed. Thus far, then, we should remain undisturbed by the force of the defendant's action.

Let us examine it a little further, and give it all the effect that can be derived from a legal source. The defendants' title, as before stated, arises, first, from possession, secondly, from the will and the deed; neither of which can be deduced from a grant. And as possession is the more ancient ground of presumption, I am at a loss to see how they are to be blended, so as to constitute one whole: And take them separately, as regards the extent of the defendant's claim, and neither ground will support the presumption:—first, because the boundaries, the consequence of possession, can no more conduct the defendants to the premises which have never been occupied, than the lines of a tract of A. will lead to the lines of a tract of B., where neither have connection with the other. Secondly, after giving all the force to the will and deed, which can be claimed by the defendants, considering them still as plaintiffs and the plaintiff as defendant, they could not eject us, because they cannot show that the premises have been possessed.

But let us now consider the claim of the defendants, in what they will possibly contend is its true character: That a possession under a will, from 1780, and under a deed from 1782, is virtually a possession of all the lands described in the deed, and that such a possession warrants the presumption of a grant; which will bring us to the third question: Is the possession, as set up and as proved, sufficient to warrant the presumption of a grant? To determine this ques-

tion properly, precedents must be consulted. In the case of the *Mayor of Hull* v *Horner*, Cow. Rep. 108, a grant was presumed, after a possession and enjoyment under that possession of 350 years, connected with other favorable circumstances. In the case of *Archer* v *Sadler*, in the Supreme Court of Appeals of Virginia, it was determined that 60 years uninterrupted possession, with other favorable circumstances, warranted the presumption of a grant. 2 Hen. & Mun. Rep. 370. In the case of *Hanks* v *Tucker*, 2 Hayw. 147, 40 years' possession, under established boundaries and an acknowledgement of the defendant that he believed the lands had been granted, and the corresponding opinion of the neighborhood to that effect, and other favorable circumstances, the court directed the jury, if they believed from the evidence, that the lands had been once granted, that they might presume a grant.

All these cases are bottomed on the case of the *Mayor of Hull* v *Horner*, decided by Lord *Mansfield*, as cited above. In which he expressly says, that the length of possession itself is not sufficient to warrant the presumption of a grant: That it is only evidence which must be left to the jury in connection with all the relative circumstances of which they are the sole judge. The same doctrine will be found in Bacon's Abridgement; Tit. Evidence, letter H. 660, and is very ably commented on in 2 Saunders in a note by Sergeant Williams. It will no doubt be contended, that notwithstanding this will and deed cannot be connected with any known or established lines, being a mere arbitrary recital of course and distance, yet under the old maxim, that whatever can be reduced to a certainty shall be considered as certain, and therefore as the lands claimed may be ascertained, what has not been done shall be considered as done. All evidence is to be considered according to the subject matter to which it refers. And the common law in raising presumptions, will at least require the existence of such facts or circumstances in this case as usually attend lands, which have been appropriated: No such facts occur, in vain we enquire for them—no marked lines, no established bounda-

ries beyond those arising from possession. A variety of occupants, strangers to each other, no mesne conveyances; then a paper title not deducible from a grant of a date long posterior to the first possession, embracing a greater quantity of acres than can be found. The seal of a Royal Governor, abandoned without the scrape of a pen, authorising the possession of those who succeeded. Yet no doubt it will be urged, that whatever can be reduced to a certainty shall be considered as certain; according to this position, a recent act must become the foundation of the presumption, and one in its nature better qualified to repel than to support it.

Such refinement never can be countenanced by the common law. Since the first possession, 45 years only have elapsed, and only 35 since the commencement of the defendants. And as there are no reported cases even under the most favorable circumstances, where a grant has been presumed in so short a time, we can but expect a new trial. In order to show the tardy operation of the common law doctrine of presumption as regards grants, see the opinion of Justice *Haywood*. 1 Hayw. 468, 469. In remedy wherof the Legislature passed the act of 1791, entitled "An Act for quieting ancient possessions."

I shall offer no remarks on the first and last question.

Henry, for the defendant, contended, that a grant might be presumed from length of possession; and relied on the cases commented on by the plaintiff: That if the possession was continued it was not necessary that any privity should be proved between the successive tenants; for whether it existed or not, the possession equally proved, that the State had parted with her title: That in this respect the case differed from a title set up under the statute of limitations; for there the possession is part of the title, and must be connected with it, otherwise the bar does not arise. Here the possession is only offered as a circumstance: That the act of 1791 was cumulative, and did not affect the common law rules, and that both in reason and law, the possession of part, under a deed claiming the whole, was a possession of the whole.

TAYLOR, C. J. There is so much natural justice in the common law principle which is now brought into dispute; it is so well adapted to meet the exigencies of men and to provide for the contingencies which might affect their property, that I think it would be a public misfortune, if we felt ourselves bound to decide that it is not in force in this State. It certainly would shake a very large proportion of the titles in this country, and render it almost impossible for people hereafter to establish their rights, under the continual subdivision of lands which our law of descent produces. After a great lapse of time, the law ought to supply that proof, which, according to all probability, once had existence, and might have been produced, if the subject had been litigated at an earlier period. The loss of papers, the destruction of records, the death of witnesses, are events, some of which may, and others must happen. But the rights which they established ought not thereby to be affected. It is therefore a very rational distinction made by the law, between length of time operating as a positive bar, and that which is only used by way of evidence. The first is made by act of limitation, conclusive upon courts and juries. But when length of time is relied upon as evidence, the jury will believe it or not, according to the attendant circumstances. After a seven years' possession under a colour of title, they are bound to decide in favor of the defendants: after a long continued naked possession, the jury will consider how far it goes to convince them that a grant had originally issued. It is an application of the common principle, that where the fact itself cannot be proved, you may give evidence of such circumstances, as, in all probability, never would have existed without it.

The design of the act of 1791, was to give that protection to individuals against the State, which the act of 1715 had afforded them against the claims of each other. In other words, to render a certain length of possession a positive bar, which no former law had done. Before any act of limitation had been made to extend to the crown in England, many cases had established the position, that long possession

in the party might be given in evidence to a jury, that it had originally commenced by a grant, notwithstanding the maxim of *Nullum Tempus;* and since tho sestatutes have been passed, 21 Jac. 1, c. 2, & 9 Geo. 3, many possessions have been quieted against the crown, by presuming a grant. Yet the argument there is equally applicable, that those statutes had repealed the common law, but it never was advanced. It is observable too, that some of those decisions were made at a time when the prerogative maxim received a full portion of respect. In truth, it has never been called into practice but by arbitrary princes and unprincipled ministers, and has been considered by the best judges and writers, as repugnant to natural equity and the maxims of a free government. The principle of presuming a grant has been carried to a great extent in the case of *Eldridge* v *Knott*, Cow. Rep. 315, where Lord *Mansfield* says, "It is not that in such cases, the court really thinks that a grant has been made; because it is not probable a grant should have existed without its being upon record; but they presume the fact for the purpose and from a principle of quieting the possession." Upon the first question, therefore, I am of opinion, that the evidence of possession prior to the years 1780 and 1781, was properly received. As to the second question, I think that the possession of the defendants was coextensive with their title. When that is established, either by the production of a grant, which was not done, or by evidence to enable the jury to presume a grant, which was given,—the possession, in contemplation of law, extends to the boundaries of the title; consequently a possession of part is a possession of the whole. The length of possession was quite sufficient to warrant the finding of the jury. The other circumstances in the case added much to its weight, such as the destruction of the clerk's office, a patent of 1735, calling for Brompton by name, and the place being noted as the residence of the Governor. Another circumstance, though not appearing in the case, must have been well known to the jury as a historical fact; viz. that in that part of the country, great changes of property had been occasioned by the Revolution. Many

of the inhabitants joined the enemy, and never returned to their homes; and valuable estates are now held solely under the petitioning law. All these circumstances must greatly contribute to the difficulty of deducing a title, and especially call for the application of legal rules which promote quiet and repose.

The colour of title was, I think, properly set up, under all the circumstances. And my opinion, upon all the questions, is, that there ought not to be a new trial.

SEAWELL, J. The motion for a new trial is grounded upon a supposed misdirection of the Judge below in directing the jury, that they were warranted in presuming a grant, from the circumstances given in evidence, and from the admission of improper evidence to the jury. There were other points made in the case, but they have become unnecessary to be decided. The last of the points stated, I will consider first. And upon this I am clearly of opinion, the Judge did right in leaving the facts of the possession in 1768 and 1769 to the jury, though there even was no connection proven between such possession and that under whom the defendant claimed. For, as against the *State*, it was a circumstance from which it might be inferred that the state had parted with its right, as well as if those in possession had been successive claimants from one another. The evidence offered in such a case, was not to make a title in the defendants, but to oust the claim of the state. These possessions were circumstances, and nothing more, and entitled only to their weight with the jury. The possession, then, from the year 1780 to the year 1814, with colour of title and by a successive chain of conveyances, was also for the same reason, proper evidence; and if the jury believed them, there was nothing in law which hindered them from presuming a grant; and this I understand to be the exposition of their being *warranted* in presuming a grant. The State, then, being stripped of all its claim, it consequently could convey nothing to the lessor of the plaintiff. The case being examined not on the improper ground of the finding of the jury, but for mistake in the court, it is not necessary to advert

to all the circumstances which might have led them to the determination they made. But it has been insisted, that although the lands in question were held by deeds ever since the year 1780, which according to the boundaries called for, comprenended them, yet as these boundaries were not known and visible, the possession under them can only be extended to actual occupancy or cultivation. But as to that, I hold the principle clear, that the possession of every individual *shall be deemed and held* according to the extent of his deed, unless there be an *actual* adverse possession to countervail this presumption, or unless where it is rendered inefficient by a superior title; in which last case, the law presumes him to be possessor who has the title. From this state of things, it frequeutly happens, that persons owning adjoining tracts, which lap upon each other, where neither is in the actual possession of the part covered by both conveyances, will be deemed in possession according to the title. The possession of the part, therefore, under these conveyances, was in law, as much a possession of the whole, as in a case where the boundaries were known and visible.

It is true, the legislature has not thought proper to pronounce such a case as this a *legal bar* against the State, as they have done where the boundaries were known and visible, but have left it as before the act, to depend upon its own circumstances. I cannot, therefore, assent to the proposition contended for, that this act is to be considered as a repeal of the common law.

Daniel J. I shall state the points and then give the answers on each question submitted to this court.

1st Question. Was it lawful for the defendants to give evidence of possession, prior to 1780 and 1782, the commencement of the only title they exhibited?

Answer. The defendants rested their defence upon length of possession, connected with a chain of circumstances, as evidence to presume a grant had once issued. And it was quite immaterial whether the grant issued to that person under whom they immediately claimed, or whether it issued to any person or persons no way connected with them. It is a

principle of law, too well settled to be now disputed, that the State has no power to grant lands which have once been granted. Whether the defendants, or those under whom they claim, had invaded the right or title ot any *citizen* or *citizens*, is not the inquiry before the court. Nor will the determination affect the rights of any third persons. All the defendants had to do was to show that the state was barred, on the ground, that it had at some former period, made a grant of these very lands to some other person. A great length of possession has been held *prima facie* evidence of a grant, both in England and many of the States, and the court did right in suffering the defendants to prove it as far back as possible. Badle v. Beard, 12 Rep. 5. Cowp. Rep. 102. 3 Term 158. 7 Term 492. 11 East 488. 4 Bur. 1963. 3 East 298, 302. Archer v. Sadler, 2 Hen. & Mun. 370 Hanks v. Tucker, Tay. 157. Alston v. Saunders, 1 Bay. 26. Phillips 119, 120.

2d Question, Was the possession of a part, in this case, to be cousidered as the possession of the whole, as the defendants did not claim under, nor bring themselves within the act of 1791, entitled "An Act for quieting ancient possession?"

Answer. It has ever been considered a well settled principle in this State, that possession of a part of a tract of land, was, in law, a possession of the whole; if this legal or constructive possession which was beyond a party's fields or enclosures, and within the limits of his title deeds, should not be resisted by an actual possession. 2 Hayw. 114, 128, 345. Although in the present case, there are no "known or visible lines or boundaries," still the defendants were at liberty to locate the land and fix its boundaries, by any of those ways which the law permits, in the absence of known lines and boundaries. The declarations of old men who knew the land and are now dead, the deeds of neighboring tracts of land, calling for the *Brompton tract, &c. id certum est, quod potest redire certum.*

3d Question. Was the length of possesion, as set up

and proved, sufficient to warrant the presumption of a grant?

Answer. It appears from the case, that some person or other has kept up a continued possession of a part of this land for 46 years. It also appears, that the defendants and those under whom they claim, have been in possession about 35 years, under colour of title. I think the jury were authorised to find as they did, under this length of possession, connected with the circumstances of a palace once having stood on the land, where some one of the old Colonial Governors formerly resided; Rowan's patent, dated in 1735, and Barker's deed in 1754, calling for this tract; the clerk's office having been burnt as early as 1768 or 1769, at that time containing the records of land titles.

The law does not fix any definite time to govern a jury, in their presuming a grant once to have existed. In England, the Judges of the court of common pleas said, they would send a cause down to be tried, and that it should be left to the jury to presume a grant, (if they thought proper), from the crown, after 20 years' undisturbed possession of a market. 3 East, 302. 303. In the case of *Hanks* v *Tucker*, Tay. 157, the party had been in possession 40 years. It is *prima facie* evidence for a jury: and I cannot think a new trial should be granted, because the jury found a verdict against evidence on this point of the case.

4th Question. Was it lawful to introduce or set up any colour of title, without having first shown that the premises had been granted, except under the act of 1791?

Answer. The colour of title set up by the defendants was only introduced as one, among many circumstances, for the jury to presume a grant. And with that object in view, it was properly submitted.

It is stated by the court, 1 Hayw. 468—9, that before the act of 1791, "persons whose lands had been actually surveyed and marked, and who had obtained patents which had been lost, and no registration of them to be found, were liable to be turned out of possession, and, in some instances, had actually lost their lands, by persons who entered claims

for them as vacant lands, though there was every reason to suppose, from the length of possession and from the visible boundaries claimed, that the lands had been once appropriated."

The preamble to the act of 1791, sets forth nearly the same reasons for the interference of the Legislature. If the Judges of this State ever decided before the year 1791, as the above quotations induce us to believe they did, I can only say, that, according to the authorities which I have cited on the first point in this case, they decided wrong. I admit that many tracts of land were held in this State, under what is vulgarly called, "*axe entries*," and no patents were ever obtained. Yet these are facts open to proof, and, when established, would most assuredly ascertain that *prima facie* or presumptive evidence of a grant, which would and in justice should arise, in such cases as those mentioned in the authority quoted and in the preamble of the act of 1791. Well might the Legislature think itself bound to do something. It passed an act remedying the most glaring part of the evil, —or, I might, perhaps with more propriety, say the blunder, —and left the law in *statu quo ante*, as to all the other cases not mentioned. This act was made for the causes I have mentioned. It was not intended to repeal the law of presumptions, but to establish it, at least in one case. It has no repealing clause annexed to it. I am, therefore, of opinion, this case is not to be governed by it.

RUFFIN, J. concurred, for the reasons given by SEAWELL, J.

Motion for a new trial overruled.

NOTE.—Upon the question of presuming a grant from length of possession, See *Dudley* v *Strunge*, 2 Hay. Rep. 12. *Sullivant* v *Alston*, Ibid 128, *Hanks* v *Tucker*, Ibid 147. *Rogers* v *Mabe*, 4 Dev, Rep, 180. *Harris* v *Maxwell*, 4 Dev. & Bat. Rep. 241. *Candler* v *Lunsford*, Ibid 407. As to possession of part being possession of the whole of a tract of land under certain circumstances, see *Larkins* v *Miller*, 2 Hay. Rep. 345. *Harris Maxwell*, 4 Dev. & Bat. Rep. 241.

WILLIAMS *vs.* LEE'S HEIRS—Page 146.

A *sci. fa.* against heirs may be amended, after the plea of *nul tiel record* pleaded, on payment of the costs up to the time of the amendment.

This was a *scire facias* against heirs, upon a judgment recovered before a magistrate against the administrator, wherein he had proved a full administration. The constable levied upon land, and returned the proceedings to the County Court whence this *scire facias* issued; but instead of reciting the judgment, it recited an execution for the same sum the judgment was recovered for. The cause was tried in the County Court, on the plea of *nul tiel record*, and on an appeal to the Superior Court, it came on to be tried before DANIEL, J. who, upon motion, allowed the *scire facias* to be amended by reciting the judgment, and the defendants to withdraw their plea, which they refused to do. The cause was then tried and a judgment rendered for the plaintiff; from which the defendants appealad to this court.

The questions submitted are, was the amendment properly allowed? If it was, ought not the plaintiff to have been taxed with costs?

TAYLOR, C. J. Several decisions have taken place under the act of 1790, c. 3, § 9, allowing amendments in a greater latitude than the present application. In the case of *Davis* v *Evans*, 1 L. Rep. 499, the declaration was amended after the allowance of a special demurrer. In *M'Clure* v *Burton and others*, decided at the same Term, the names of two defendants, inserted in the writ but not parties to the deed declared on, were permitted to be struck out, after the variance was pleaded. The act goes further than any of the British statutes; and the coustruction agreed upon by the Court and which they still think the proper one, is, that any thing may be amended at any time. This is expressly authorised by the best sentence of the act. The

amendment was properly allowed in this case, but the plaintiff must pay the costs up to the time when the order was made.

The other Judges concurred.

DANIEL, J. gave no opinion.

NOTE.—See note to *Cowper* v *Edwards*, 1 Hay. Rep, 19. Also a note to *Simpson* v *Crawford*, 1 Martin's Rep. 55, and 1 Rev. Stat. ch. 8.

SUMMERS *vs.* PARKER—Page 147.

An action of debt will not lie on a replevy bond given under the attachment law; a *sci. fa.* being the proper remedy.

This was an action of debt, founded on a replevy bond. After a verdict for the plaintiff, it was moved, in arrest of judgment, that a *scire facias* ought to have issued to give the defendant an opportunity of surrendering the principal in discharge of himself.

R. Williams, for the plaintiff, contended, that debt will lie on all specialties, and has been adjudged to lie on a replevin bond: Comyn's Dig. Debt A, 5 Term 195. That the condition of a replevy bond, as prescribed by the act, fixes a broader responsibility on the security than that of a bail bond does upon bail: That the privilege of surrendering the principal is given to the latter in express terms; but so far from being given to the securities in a replevy bond, they are liable to the whole judgment recovered, unless at the return term they have the value of the property ascertained by a jury. Act 1796, § 6.

TAYLOR, C. J. When the defendant cannot be personally served with process, his property may be attached to effect the same object which a writ aims at, viz. to enforce his appearance. That this is the design of the attachment law, is declared in so many words, by the original act in Davis's

Revisal, page 231—the attachment may be granted "so as to compel an appearance." Under the law, when the defendant did appear, he was entitled to plead, although he did not, or could not, replevy the goods attached. They were left in the hands of the sheriff to be subject to the judgment; and if they proved insufficient to satisfy it, other executions might issue for the residue. It will be evident, by collating the two laws, that the framers of the act of 1777 had, when they drew it, that of 1746 before them; and that the spirit and intention of the first law, in regard to the question now before us, are transfused into the latter law. It is true, that the first law is penned in much fewer words than the last, and is silent as to the condition of the replevin bond; and from calling it special bail in every instance, precludes any other inference, than that it was to be drawn like a bail bond. Although the act of 1777 directs, in general terms, that the bond shall be for the performance of the judgment of the court; yet that cannot change the nature of the transaction, which in every other part of the law, is regarded and spoken of as special bail. The judgment of the court, adverted to in the condition of the bond, must be *prout lex postulat*, and as this is already fixed by the law with respect to bail, it is only the expression of that which was already understood, and therefore operates nothing. I am of opinion that a *scire facias* on this bond is the only remedy.

DANIEL, J. This is an action of debt on a replevin bond, and a verdict for the plaintiff. The defendant moves an arrest of judgment, because "the bond upon which the verdict was taken, was a replevin bond, taken by Thomas Summers as constable, of the defendant Parker, and not assigned by Summers to Witherspoon; and an action of debt, brought on the same:—whereas a *scire facias* should have issued, and an opportunity been given defendant to have surrendered his principal in discharge of himself."

I am of opinion, the judgment should be arrested.

The Legislature, in its act commonly called the Court Law, 1777, c. 2, § 19, says, "All bail taken according to the

directions of this act, shall be deemed, held, and taken, to be special bail; but the plaintiff, after final judgment, shall not take out execution against such bail, until an execution shall be first returned, that the defendant is not to be found in his proper county, and until a *scire facias* against the bail." Debt will not lie on a bail bond in this State; as the above act of Assembly mentions expressly, that the bail shall not be subject to an execution until a *scire facias* shall be returned. The same construction of this act was made by Judge Johnston. 2 Hayw. 223. By the same act of Assembly, 1777, c. 2, § 30, it is said, a defendant "upon giving special bail, may replevy the estate so attached and plead to issue." It appears to me, that the same and only the same remedy, is to be had in this case, as in any other case against "special bail." This opinion is supported by the case of *Hightower* v *Murray*, 1 Hayw. 21. Let the judgment be arrested.

The rest of the court concurred.

Ruffin, J. This is an action of debt, on a replevin bond, given by the defendant and others, to replevy property levied on by Summers a constable, under an original attachment sued out by Witherspoon against one Johnston. The jury found a verdict for the plaintiff, and a motion is made in arrest of judgment, for the several reasons offered. I shall only consider one of them; because being of opinion with the defendant upon that, it is unnecessary to examine the others.

There is certainly some obscurity in the act of 1777, c. 2, upon this subject. The 28th section directs that "when any estate shall be attached, it shall be lawful for the defendant to replevy the same, by giving bond to the sheriff to appear at the court to which the attachment is returnable, *and to abide by, perform, and satisfy the order and judgment of such court.*" That is very different, it is true, from the condition of a *bail* bond; and in analogy to the phraseology of section 47 and 82, relating to bonds for the prosecution of writs of error and appeals, it is argued, that replevin securities are more than bail, and, like securities for an ap-

peal, are liable, absolutely, to satisfy the judgment. I should perhaps think so too, if the objects of the law were the same in these cases. But they are very different. An attachment arises out of the necessity of the case, and is substituted for an actual personal service of process. Both are intended to compel an *appearance*, and for no other purpose. If actually arrested, the defendant is discharged on bail. That is deemed a sufficient security for his appearance; and I cannot perceive a reason why more should be required in the case of an attachment. Construing those clauses of the act, therefore, according to the subject matter, I should rather be of opinion, that a *replevin* bond is intended to be a *bail* bond. But whatever difficulty might arise in the exposition of the 28th section, by confining ourselves to the consideration of that section alone, is removed, I think, by taking the whole of the act of 1777 and statute 1793, c. 16, § 6, which is in *pari materia*. The bond spoken of in § 28, is that taken by the sheriff before the return of the process. In the 33d section, which concerns the proceedings against persons residing out of the State, it is enacted, that if the defendant appear, *put in bail, &c.* his estate shall be liberated and the garnishee discharged. And, by § 30, any person against whose estate an attachment hath issued, at any time before final jundgment entered or writ of inquiry executed, upon giving *special bail*, to replevy, &c. may plead, &c. Now it cannot be supposed, that the Legislature could intend greater privileges to persons residing out of the State than to her own citizens; and yet to the former is expressly given the liberty of receiving their estate attached, upon *giving bail*. Nor, I think, could it be intended, that if a defendant came forward as soon as the process was served, and replevied from the sheriff, his securities should become surety for the debt, but if he delayed replevying until the writ was returned, that his securities should then be *only bail*. Such a construction would create a difference, where no good reason for a difference exists, and attribute to the Legislature a spirt of arbitrary legislation. But the 30th section seems to be an express declaration, that bail and replevin securities are

the same. The words are therein used as convertible terms "*Upon giving special bail*, to *replevy*, &c. This is also the case in act 1793, c. 16, § 6, where replevin securities are called "persons entering themselves *special bail* or *replevying* property," &c. And so far from placing them in a worse situation than bail, this act was intended for their relief, by declaring them only liable for the value of the property attached, under certain circumstances; and it is observable, from the preamble of the section, that it was enacted on account of the construction placed on the former acts by the courts; and was, in all probability, the consequence of the judgment in *Hightower* v *Murray*, decided at Halifax, in April, 1793; in which it was held, that replevin securities were bail, and consequently liable for the *whole* debt, as bail. Since, in the act of 1793, and section 30 and 33 of the act of 1777, they are called bail, and therefore are so far as these sections go, to be treated as special bail; unless replevin securities, as mentioned in the 28th section, be also regarded as bail. Enactments directly contradictory, upon the same subject and in the same statute, must be imputed to the Legislature.

The result follows, that the judgment must be arrested. For if the defendant is bail, he cannot, by the express words of statute 1777, c. 2, § 19, according to the uniform practice of the courts and the decision in *Hunter* v *Hill*, 2 Hayw. 223, be liable *until* a *scire facias* shall have been made known to him.

My opinion, therefore, is, that judgment be arrested.

NOTE.—See *Hightour* v *Murray*, 1 Hay. Rep. 21, and 1 Rev, Stat. ch. 6, sec. 10.

HOOD *vs.* ORR—Page 151.

If an appeal from the County to the Superior Court is not filed within the time limited by law, it must be dismissed, although such omission proceeds from accident, and without *laches* in the appellant; but in such cases a *certiorari* will be granted.

Motion in the Superior Court to dismiss an appeal, because not brought up within the time prescribed by law.

The Clerk of the Superior Court died in the vacation, leaving no deputy, and there was no person to receive the appeal, from the time it was made until the first day of the Superior Court.

RUFFIN, J. I do not think that the appeal ought to be sustained in this case. If the appellant was without remedy, that might make a difference, perhaps. But he is not; for it has been usual to grant a writ of *certiorari* in such a case, and, indeed, in all others, where the appellant has been prevented from filing the record by accident and without his own *laches*. This, is, therefore, rather a question of *practice* than of property; and it is almost of as much consequence that the rules of practice should be certain as that they should be right. The act of Assembly is positive upon this subject; and since the case of *Robertson* v *Stone*, 1 Hayw. 492, the courts have always refused to relax the rule of law, without any regard to the causes of failure of the appellant. Those decisions appear to me to be very proper, independent of the statute. For although the appellant may have a very good excuse for not filing his appeal, and ought, therefore, not to be precluded from a new trial; yet the appellee, who knows that the cause is at an end by positive law, unless the record is removed to the Superior Court in due time, is no longer bound to look after the case or prepare for trial, after the first failure of the appellant. If the suit is afterwards suffered to go on, he ought to have notice

of it. This he gets when a *certiorari* is granted. But, otherwise, he has no notice.

The rest of the court concurred.

NOTE.—See *Robertson* v *Stow*, 1 Hay. Rep. 401. *Gregory* v *Bray*, 1 Martin's Rep. 39. The law regulating the mode in which appeals shall be carried from the County to the Superior Court has been altered. 1 Rev. Stat. ch. 4, sec. 3, 4 and 5.

DEN ON DEM. OF ANN B. POLLOCK *vs.* KITRELL—Page 152.

A tenancy at will is not created until the lessee enters, Hence a tenant at will who has never had possession cannot maintain ejectment.

Where the plaintiff obtains a verdict, but the statement of the case shews he had no title, a new trial must be granted. But if the merits appear to be with the plaintiff, the court will give him leave to add other counts.

This was an ejectment, tried before DANIEL, J. at Bertie Superior Court, where the jury, under the charge of the court, found a verdict for the plaintiff. The title was regularly deduced from the patentee, whose devisee, George Pollock, exchanged the land with the lessor of the plaintiff for part of her dower. It did not appear, at the trial, that any written conveyance was made to the lessor of the plaintiff, nor that she was ever actually in possession of the land, possessed by the defendant; but this latter objection was not made till after the trial. Upon a motion for a new trial, the court was of opinion that a tenant at will can maintain an ejectment; and overruled the motion for a new trial, made on the ground of want of possession in the lessor.

The questions submitted to this court are, Whether a tenant at will can maintain an ejectment? and, Whether a new trial ought to be granted, on the facts stated? and if granted, Whether upon permission to the plaintiff to add new counts?

Hogg, for the plaintiff. The lease stated in a declaration,

is a mere fiction, and never allowed to control the justice of the case. A tenant at will, may maintain ejectment. Mann. 3 Term 13. 4 Term 680.

No other point of law was raised at the trial; the merits, after a laborious investigation of boundary, were clearly with the plaintiff; and the objection of her not having had possession, was not suggested till after the verdict.

Taylor C. J. I think it may properly influence the court to impose terms on the defendant, when a new trial is granted, that the plaintiff's title, on the score of possession, was not objected to at the trial; but when a statement of facts is set forth in the record, from which the conclusion of law is, that the plaintiff has no title, we are bound so to adjudge, by granting a new trial. Now, although, a tenant at will may maintain an ejectment, yet no person can be such tenant, without entering upon the land, his sole right to which consists in enjoying the land by consent of the owner. For many purposes, the lease is considered as fictitious; but it is always essential, that it should appear that the lessor of the plaintiff had a right in him when the lease was made, for this is the very question to be tried in the ejectment. There ought, therefore, to be a new trial; but, considering the manner in which the objection is made, the plaintiff must have leave to add any other counts to the declaration, which he thinks fit.

Ruffin, J. The case states, that the lessor of the plaintiff never entered into the lands proved on the trial to be in the defendant's possession;—and it does not appear, by express statement, or by any sufficient implication, that she was possessed of any of the lands covered by the patent under which George Pollock claimed title. Consequently, the first question for the opinion of this court does not arise upon the facts stated in the record. It cannot be material to the plaintiff whether a tenant at will can maintain ejectment, if the lessor of the plaintiff was not such a tenant. A tenancy at will cannot be created, until by force of the lease, the tenant obtains possession. Before entry, the lease is a bare *contract*. Since, therefore, the lessor of the plain-

tiff had no title, she ought not to have obtained a verdict; and the court is bound to take notice that the plaintiff hath not made out a case in point of law, on which he can recover, although the defendant's counsel shall not make any objection. There must, therefore, be a new trial. But, since from the verdict, we are to presume, for the present, that the merits are for the plaintiff, it would be unjust to favor the defendant so far as to allow him an opportunity of a second investigation of them, but upon such terms as will enable the plaintiff to go to trial upon the merits. The new trial must consequently be granted upon the terms, that the plaintiff may add such counts upon other demises as may be thought proper.

The rest of the court* concurred.

*DANIEL, J. gave no opinion.

SCOTT *vs.* McALPIN—Page 155.

Where an attorney in fact conveys land in his own name without reference to his power or his principal, nothing passes by the deed.

This is an action of trespass, *quare clausum fregit*, and *liberum tenementum* pleaded.

It is admitted, on both sides, that Abram Dubois, sen. of the city of Philadelphia, had a fee simple in the land in dispute, before the year 1807.

The plaintiff deduces his title to the land, from the aforesaid Abram Dubois, sen. in the following manner, viz.

A Copy of the Records of the Court of Pleas and Quarter Sessions of the County of Robeson, in the following words:—

"State of North-Carolina, Robeson county, Court of Pleas and Quarter Sessions, July Term, 1807. A power of attorney from Abram Dubois, sen. of the city of Phila-

delphia, and Mary L. Dubois, his wife, to Abram Dubois, jun. which did appear to have been acknowledged before Robert Wharton, Esq. Mayor of the city of Philadelphia, was produced by the said Abram Dubois, jun. and ordered to be registered."

He then proved by the deputy clerk of the County Court of Robeson, that Abram Dubios, jun. made application to him for the said power of attorney: That it was delivered up, after Abram Dubios, jun. had made the deed to *Mix*, and the said Abram Dubois, jun. never returned it, nor was it ever registered; and the said Abram Dubois, jun. left the State. He farther made it appear, that he had given notice to the defendant's attorney to produce the said power of attorney in court.

The plaintiff proved, that the power of attorney contained ample authority to Abram Dubois, jun. to sell and make title to all or any of the lands of Abram Dubois, sen. in the county of Robeson. All this testimony was objected to by the defendant, but admitted by the court. Plaintiff then offered a deed executed in the name of Abram Dubois, jun. to to William P. Mix, dated the 31st of July, 1807, in which it is stated, that he has full power and authority to convey. This was opposed by defendant, but admitted by the court. On the 26th of August 1807, Mix conveys the land to the plaintiff.

The jury gave a verdict for the plaintiff; and a motion is made to set aside the verdict and enter a non suit, on the following grounds:

1st. Because it does not appear, that Abram Dubois, sen. ever gave a power attorney to Abraham Dubois, jun. The certificate and seal of the Mayor of the city of Philidelphia, was not a sufficient authority for the county court to admit the deed to probate and registration.

2dly. If the power of attorney to Abram Dubois, jun. had been legally acknowledged, still Abram Dubois, jun. could not make any title to the land until the power of attorney was registered.

3dly. The deed to Mix is in the name of Abram Dubois, jun. and makes no mention of Abram Dubois, sen. in whose name it should have been executed; neither is the power of attorney mentioned in said deed.

Browne, for the plaintiff.

Even if registration is considered as a condition precedent, to giving the power of attorney in evidence, the obstruction of the party against whom it is to be given in evidence, shall excuse as to him and all claiming under him. Com. Dig. Condition, *l* 6.

The enacting clause of stat. 1798, c. 37, § 3, extends to all powers of attorney: and when taken in conjunction with statute 1715, c. 38, § 7, *in pari materie*, may extend to this case, and authorise the certificate of the Mayor of Philadelphia. The act does not even say, that the registration shall be evidence. But suppose this is not the right construction. Yet the plaintiff, on application to the court, might have got the deed and had it regularly proved, which the defendant hath obstructed.

But the act of 1798 does not require, but authorise the registration of powers of attorney, leaving the party to register or not.

A deed produced, on notice, by the adverse party, ought to be read in evidence without proof of its execution. 2 T. Rep. 41. Rex v. Middlesay. Nor is it necessary to prove its execution, where you have recourse to inferior testimony. 1 Esp. N. P. Rep. 410, Doxon v. High & al.

The entry on the minute docket of the county court is complete evidence, not only that the power was executed, but of its contents. 5 Esp. Rep. 233. Kirwan v. Cockburn.

Here, however, other proof was given.

In these cases, the instruments were in the adverse party's hands, rightfully; but here it is far otherwise;—and the maxim, that every thing is to be *presumed in odium spoliatoris*, strongly applies.

In 1 Cranch, 345, the deed was signed as here, and the court held the obligation not to be on Dexter, but the govern-

ment. *Hodgson* v *Dexter*. Same in this court, in *Potts* v *Lazarus*, in January 1815.

If a man has a power or authority, and does an act which can only be valid, by virtue of that power or authority, he shall be presumed to have done that act under his power or authority, although he does not refer to it. Sir Edw. Clare's case. So in equity. 1 P. W. *Tomlinson* v *Deighton*.

DANIEL, J. delivered the opinion of the court:

We are all of opinion, that the estate, in fee simple, which was in A. Dubois, sen. remained there, and could not be divested, unless the deed had been executed in his name, by himself or by his attorney, (if he had any). A power of attorney authorises the agent to make use of the name of his principal. If A. Dubois, jun. thought proper to execute a deed for land in his own name, nothing passed by that deed, but what A. Dubois, jun. had; and, as it is admitted he had no estate himself, none could pass to Mix, under whom plaintiff claims.

When land is conveyed by virtue of a power of attorney the purchaser is in, not from the attorney, but from the principal, who retains the estate, until one of those deeds which will pass lands, has been executed in his name by the attorney.

Who has the title? is the question submitted to us. We are bound to say, from the facts of the case, it is not in the plaintiff. 2 East 142.

New trial granted.

NOTE.—See *Locke* v *Alexander*, 1 Hawks 412. *Redmond* v *Coffin*, 2 Dev. Eq. Rep. 441. *Oliver* v *Dix*, 1 Dev & Bat. Eq, Rep. 158.

SHAW vs. KENNEDY--Page 158.

An ordinance passed by the commissioners of the town of Fayetteville directing the constable to take up and sell all hogs found running at large in the streets is void, because the act of Assembly gives every person who thinks himself aggrieved by the judgment of the commissioners, the right of appeal, and because such ordinance condemns the property without hearing the owner.

This was an action of trespass, for taking four hogs, the property of the plaintiff.

The defendant justified the taking, on the following ground, viz. That the commissioners of the town of Fayetteville, under and by virtue of an act of the General Assembly, "for the better regulation of the town of Fayetteville, chapter XXIX, 1787," passed the following ordinance, viz.

"Whereas the several ordinances heretofore passed by the board of commissioners, and in force, against hogs running at large in the streets of the town, having been found ineffectual, it is again ordered, that from and after the 15th day of June next, the town constable be, and he hereby is authorised and required to take up and sell all hogs, found running at large in any of the streets in town. One half the proceeds of such sale to be returned and accounted for by him to the town treasurer, the other half to apply to his own use."

The defendant was constable of the town, duly appointed by the commissioners of said town; and in that capacity, took the hogs, &c.

M'Millan and *Henry*, for the Plaintiffs.

Gaston, for the defendant.

SEAWELL, J. delivered the opinion of the court:

By the 5th section of the act of Assembly, for the better regulation of the town of Fayetteville, the commissioners are vested with full power to make "any rules and orders which may tend to the advantage, improvement, and good

government of the said town," with a proviso, that such regulations should not be inconsistent with the *laws of the land*; and by the last section of the same act, it is provided, that in all cases where any person shall be dissatisfied with the judgment of the said commissioners, he shall have the liberty of appealing to the county court of Cumberland. The questions then necessarily arising, are, whether the ordinance in question was contrary to the laws of the land? or, was the party to be affected thereby, prevented from the benefit of appeal guaranteed by the charter of the commissioners?

The laws of the land, or, in other words, those laws which do operate over the *whole country* without being directed to any place or particular individual, allow to every person the opportunity of defending his property before it is condemned; and in no case leave it to the mercy of a mere ministerial officer, to seize it at will; which seizure is to be lawful or not, according to his own will and pleasure. The ordinance, therefore, on that account, was unauthorised and consequently void. And as to the other question, that seems equally clear. By the mode of proceeding directed by the ordinance, the owner of the property seized, had no opportunity allowed him of appealing to the County Court of Cumberland, and on that account also, the ordinance was void.

As to the argument, that hogs in a town, are a nuisance, and that it was justifiable in the defendant to abate it, the authorities to prove hogs a nuisance, all speak of them in a stye or pen, which necessarily produces a stench, and consequently, an inconvenience to the neighbouring people.

The plaintiff, therefore, has unlawfully been deprived of his property and has a right to judgment for the injury sustained.

Taylor, C. J. The act of Assembly under which this ordinance was made, contains, in addition to the general powers in the 5th section, the following specification —"that the said commissioners are fully authorised and particularly required and directed to make such laws and regulations as

they may deem necessary to prevent hogs running at large in the said town." I admit, in the fullest extent, the general positions which have been insisted on in behalf of the plaintiff, that all bye laws must be consistent with the constitution and the laws of the State: That no man shall be deprived of his property but by the law of the land: and that the right of appeal is by the act given in very comprehensive terms. But this law must be construed by those rules which have ever been applied to statutes, and which make the common law the basis of construction in all cases;—which suppose the common law to subsist where it is not expressly or virtually repealed,—and which permit the meaning of the law to correct, restrain, or enlarge the words of it. It is not necessary to cite authorities for these rules. If it were, I know not where they are better explained than in Plowden; who compares a statute to a nut. The sense, he tells us, is the kernel: the words are only the husk or shell. The right of appeal, then, must be confined to those cases, where the property or thing in dispute is susceptible of legal protection from it, and where such right can be exercised without taking away or impairing the pre-existing common law rights of others. There are many instances, where every man is allowed a private and summary method of doing himself justice for injuries, which cannot wait for the slow forms of justice, and which would be altogether irremediable if they were to be referred to a future decision. However wise and salutary the laws of any country may be, the state of Nature must, in some respects, subsist between the members, and must be resorted to in those cases where the laws cannot afford protection. It is on this principle, that a nuisance may be abated by the party aggrieved by it, because it annoys that which is of continual comfort and convenience to him; and this, it would be unreasonable to require him to submit to, until he could obtain the aid of the law; as much so, as to require him to submit passively to a battery or any personal wrong.

The right which every individual member of a town possesses, will not be denied to belong to the corporation, insti-

tuted for its government and police, in relation to such injuries, as are done to either in a manner requiring prompt redress. If it is not transferred to the members of the corporation by the inhabitants who choose them, it subsists in them independently, as an essential attribute of their office, and one, without which, it is impracticable to effect the objects for which they are constituted. As it has been decided, that they are indictable for not keeping the streets in repair, it seems reasonable that their power to perform this duty should not be weakened be stripping them of any of those common law rights without which the duty cannot be discharged. For if they may not abate a nuisance, until the question be decided with the owner of the property, after an appeal through all the courts, it is evident, that they must be overtaken by the penalty of an indictment, for the very act which they cannot remedy. I acknowledge that this reasoning is altogether irrelevant, unless it is a nuisance for hogs to run at large in the streets of a town. I think it is within the definition of the term, and quite as much an annoyance as many acts that have been decided to be nuisances. Lord *Mansfield* has said, that a nuisance is, *whatever renders the enjoyment of life and property uncomfortable.* 1 Burr. 337. It is not necessary to multiply words in proving that the enjoyment of property, in a town, is most essentially interrupted by the practice in question. Streets rooted up, and the ordinary enclosures broken down, impede all improvement, public and private. Mud holes made in public ways, charged with stagnant water, whence a fervid sun constantly exhales affluvia of intolerable stench and noxious qualities, must, in this climate, be inimical to health. No inhabitant of a town can be insensible of the degree in which the enjoyment of life is thus diminished, unless every avenue to his house, or the space under his house, is effectually guarded against the intrusion of these animals. In short, all the inconveniences produced by them, the enumeration of which seems almost inconsistent with the gravity of a judicial discussion, satisfy me, that, upon principles of common law and common sense, they answer the definition of a nuisance.

And it may be added, in proof of the sense entertained by the people of this State on this subject, for upwards of a hundred years, that the earliest private act upon record, contains a similar provision, in substance, with this ordinance; and almost every private act since that time, establishing a town, confers a like power upon the commissioners. Keeping hogs in a town, is, in England, a nuisance, both by common law and by statute; as is evident from the case of *Reginia* v *Wigg*, 2 Ld. Ray. 1163, and for the reasons I have given, suffering them to go at large in a town, is a nuisance in a greater degree, according to my conception of the comparative inconvenience of both practices.

Whether an act amounts to a nuisance, must depend upon the place in which it is done, and its tendency to produce those inconveniences, which are specified in the definition of the offence. Thus an act may amount to a nuisance, in a town, which would not be so elsewhere. Whatever tends to retard the improvement of a town, or to render a residence in it uncomfortable, must be a nuisance; because it deprives the owners of lots of the enjoyment of their property, and is inconsistent with the original purpose of the grant, which was, that the lots should be built upon. A magazine of powder kept in a populous part of the town, would be a nuisance because it would give a reasonable cause of apprehension from fire. A man, on his own farm, may erect his own hog-stye; but, in a town, he cannot keep hogs, or erect even a dove-cote or pigeon-house, so near my dwelling as to offend by the smell. Either of these is a nuisance. Roll. 141., 9 Coke 57. 16 Vin. 25. On the same principle, a matter may be a nuisance, in one part part of the town, which would not be so in another. Some trades ought not to be pursued in the principal parts of the city, but in the outskirts. 2 Show 327. A lime kiln so near my house that the smoke offends, is a nuisance. 9 Coke, 59. The principle on which the law proceeds, is so to use your property, as not to injure that of another. 3 Selw. 974. One great object of the incorporation of a town or village, is a more summary inquiry into nuisances and removal of them.

Law. Mis. by Judge Breckenridge 160. For these reasons, I am led to conclude, that the commissioners have not transcended their powers, by this ordinance. But as all the rest of the Court are of a different opinion, there must be

Judgment for the plaintiff.

STATA *vs.* WASDEN—Page 163.

A caption to an indictmet is only necessary, where the court acts under a special commission; and a mistake in the caption of an indictment found in a court which sits by the authority of a public law will not vitiate the indictment.

The defendant was indicted for perjury, and demurred to the indictment, "because it appears to have been found at October Term of Wayne Court, whereas there is no such Term of said Court, recognized by the law; wherefore," &c.

The case was submitted.

SEAWELL, J. The design of a caption to a bill of indictment, is, that it may appear the indictment was taken by competent authority; and this can only be necessary to be spread upon the proceedings, when the court acts under special commission; for, in all cases where the court sits by the authority of a public law, every body must take notice of it, and Judges judicially know it; for Superior Courts being holden by law, it no longer follows, that it is necessary specially to set forth the power of the court. When the whole records are referred to in this case, (and they form part of the case), it appears that the indictment was taken by the jurors for the State, at a Superior Court holden, by authority of law, for the county of Wayne, before *Samuel Lowrie*, one of the Judges of the Superior Court. The caption not

being any part of the charge, but something written upon the top of the bill of indictment, has no influence over that which the jury have found.

Demurrer must be overruled.

RUFFIN, J. The point in this cause decided in the the *State* v *Jeffers*, Conf. Rep. in relation to indictments in the County Court. The act of Assembly of 1811, c. 6, put indictments in both courts on the same footing, as respects *form*. But I should think, for the reasons given by my brother SEAWELL, that independent of the act, the indictment would be good. It is only necessary that it should appear that the bill was found in a competent court; it is immaterial at what time it may be.

The rest of the court concurred.

NOTE.—See *State* v *Jeffreys*, Conf Rep. 364. *State* v *Sutton*, 1 Murph. Rep. 281.

STATE *vs.* COX—Page 165.

A man may be indicted separately under the act of 1805 (1 Rev. Stat. ch. 34, sec. 46) for fornication and adultery.

The defendant was indicted under the act of 1805, c. 14. The charge against him was for bedding and cohabiting with a woman of the name of Hawkins. A motion was made to quash the indictment, because the woman was not joined with the defendant in the charge.

The case was submitted without argument.

TAYLOR, C. J. This question has been much discussed in the Superior Courts; and it is time that the law should be understood by the community; for I believe that no judgment has been passed in any case, where the objection was taken. I have revolved in my mind the several arguments I have heard against indicting the man separately, but

they do not satisfy me that the proceeding is wrong, or that any principle of justice or legal analogy is in danger of violation by it. The first proof in support of the indictment, may be derived from the act itself, which provides, "that the evidence of the person who may be *particeps criminis*, shall not be admitted to charge any defendant under this act" This contemplates a separate charge, because it speaks of a *particeps criminis* as contradistinguished from a defendant. If a joint indictment had been in the view of the Legislature, the provision would have been nugatory and superfluous; for then, one defendant could not have been a witness against the other. 2 Campbell's N. P. 233.

Secondly. A separate charge is supported by the analogy of other cases. A judgment may be given against one defendant in a conspiracy, before the other is tried. 1 Strange 193. So one conspirator may be convicted after the other is dead. 2 Str. 1227. Persons have been tried and convicted of the crime against nature, though the agent was separately charged, and the offence could not have been committed without the concurrence of the patient. The case of *Respublica* v *Rocerts*, 1 Dall. 124, is directly in point. The defendant was indicted separately for adultery. He was not, it is true, convicted of that offence, because it appeared that he was not married; and they have a notion there, different from what the books teach us, that both parties must be married in order to commit that crime; but judgment was given against him for fornication. Lastly, the reasoning of the court, in the case of *De Costa* v *Jones*, Cowper 736, manifestly shows, that wherever a question arises upon a real matter of right, though the interest or feelings of third persons, not parties, may be affected by it, it shall be tried. The action in that case, was held not to lie upon a voluntary wager upon the sex of a third person, because, amongst other reasons, it tended to disturb his peace. But, there is a wide difference between affecting the feelings of a third person by an idle wager, and by a grave inquiry into a public misdemeanor. The quiet of a man's mind should not be at the mercy of indifferent persons, to gratify their avarice or be-

guile their idleness; yet occasions will arise, when it must yield to the necessity of deciding civil and criminal rights.

DANIEL J. The indictment states, that the defendant, Hawkins Cox, unlawfully bedded and cohabited with a certain woman, by the name of Hawkins, contrary to the act of the General Assembly in such case made and provided. I do not consider, the law requires both parties to be before the court, and put upon their trial at the same time, in order to support an indictment under this act. I discover nothing in the wording of the act, to authorise such a construction. There are some cases in the books, which go to prove the defendant may be thus prosecuted. Stra. 193, *Rex* v *Kinnersley and Moore.* They were indicted for a conspiracy; and Kinnersley, only, was tried and found guilty. A motion was made in arrest of judgment, because one only was found guilty, when the law requires two persons at least, to form a conspiracy. It was answered, and so held by the court, that as the case stood, both were found guilty, although Moore, was not, as Kennersley was, concluded by the verdict. And so judgment may be given against one before the trial of the other. So one may be indicted and punished for a riot, if it is laid to have been done by him, *cum multis aliis.* 3 Burr. 1263. 1 Ld. Ray. 484. 2 Salk. 593.

The possibility, that some evil disposed man might procure himself to be indicted for fornication, with some good and virtuous woman, I think, is too remote to govern this case. The penalty which would fall on the defendant, by virtue of this act, the grand-jury, the State's officer, the court, and her friends, would, in my opinion, be sufficient guards to protect her from such an outrage.

The motion to quash overruled.

HALL, J. LORRIE, J. and RUFFIN, J. concurred, in overruling the motion to quash.

SEAWELL, J. dissented.

GAITHER *vs.* MUMFORD—Page 167.

Where the possession does not accompany and follow the title, the transaction is fraudulent in law.

If an absolute deed is made of a chattel, and a defeasance is made at the same time but separate from it, it shall not operate as a mortgage to the prejudice of third persons, but will be fraudulent and void as to creditors and purchasers.

This was an action of detinue, for a negro, tried before LOWRIE, J. at Rowan Superior Court, where a verdict, under the charge of the court, was found for the plaintiff; and, upon a motion for a new trial, the case was referred to this court. The material facts, as extracted from the record, are as follows:

Bryant was indebted to Pearson, who recovered two judgments against him, on the 30th December, 1811, before a magistrate, for the sum of sixty-seven dollars. Bryant stayed the executions, giving the plaintiff security for the debts, and to indemnify him, executed an absolute bill of sale to him for the negro sued for, on the day after the judgments were recovered.

At the same time, the plaintiff executed to Bryant an instrument under seal, whereby he acknowledged the purpose for which the bill of sale was made, and promised to surrender it, under a penalty of four hundred pounds, provided Bryant paid the judgments on or before the 1st January, 1814. Both the above instruments were drawn by a person who was keeping store for the defendant.

Bryant, at this time, was indebted to the defendant, who, in the following February, warranted him, and having recovered judgment, had the execution levied upon the negro, then in Bryant's possession, having so continued from the date of the bill of sale. The negro was sold and the defendant became the purchaser, to whom the constable made a bill of sale, and who then took the negro into possession, and had him when the suit was brought. The bill of sale

to the plaintiff, as well as that to the defendant, was duly proved and registered; but the bond from the plaintiff to Bryant was proved and registered on the day the trial took place in the Superior Court. The defendant knew of the conveyance to the plaintiff, and of the bond, before he sued out his execution.

A. Henderson, for the defendant.

It is now settled, that unless possession accompanies and follows the deed, it is not merely the evidence of fraud, but is fraudulent *per se*. 2 Term. 587. The deed from Bryant being absolute on the face of it, left the property liable to the demands of any of his creditors who found it in his possession. The particular agreement between him and the plaintiff, contained in the bond, could not affect the rights of others. But if it had been annexed to the bill of sale, and recorded with it, it would have amounted to no more than a mortgage; and possession belongs to the mortgagee as much as to a vendee. This appears from *Ryall* v *Roll*. 1 Atkyns 168. There is no agreement in the bond, that the possession is to be retained by Bryant; and, unless a different provision had been made in that instrument, the right of possession belonged to Gaither. 1 Cranch 306. 1 Wilson 261. Whatever character the bond may give to the transaction, as between the parties themselves, it cannot make it a mortgage as to others; for the very circumstance of separating the defeasance from the deed, is indicative of fraud. Gooch's case, 5 Coke.

Murphey, for the plaintiff.

Where there is an absolute bill of sale, I agree that it is fraudulent in the vender to retain possession; it is then a legal fraud. But where there is a mortgage, a condition, or a trust, it is then an inquiry for the jury under all the circumstances. This will appear from one of the cases cited on the other side. *Ryall* v *Roll*, 1 Atk. 163, was on a mortgage; and Mr. Justice Burnet, in giving his opinion, says, "Courts of Equity and juries are to consider, upon the whole evidence, whether the conveyance was made with a view to defraud or not." In the same case, Chief Justice

LEE, says, "At common law, it was left to juries to consider whether conveyances of this sort were fraudulent against creditors not."

All the cases cited on the other side, to prove that the mortgagee of a chattel or land is entitled to the possession, are constructions upon the bankrupt law, 21 Jac. 1, which, in that particular, altered the common law. In *Stone* v *Graham*, 2 Balstrode, Lord *Coke* says, "The possession of the mortgagor is not fraudulent; but if it had been an absolute conveyance, it would have been fraudulent." And upon this being cited in *Ryall* v *Roll*, arising under the bankrupt act, the Chief Justice rejects it, because it was founded upon the common law and the statute of Elizabeth, the plan of which statute differed from that of Jac. 1. In fact, the latter statute expressly gives power to the commissioners to sell property assigned by the bankrupt, but remaining in his possession; from which the inference is, that without such power, the bankrupt's remaining in possession would not have avoided the conveyance. But I admit, that where the conveyance is absolute, the modern decisions on the common law and statute of Elizabeth are too strong to be resisted. In mortgages, however, the continuance of possession in the mortgagor is no badge of fraud, within the statute of Elizabeth. Shepp. Touch. 65, Lambert's case.

TAYLOR, C. J. The bill of sale purports to convey an absolute property in the slave, while, by a separate deed made at the same time, the title of the plaintiff is liable to be defeated, upon Bryant's paying the amount of the judgments. To separate the defeazance from the deed, is always a suspicious circumstance. *Cockrell* v *Purchase*, Forrest. 61 Both deeds were registered within the time required by law, yet the latter not being registered until the moment of trial, is strongly indicative of a wish in the parties to cover half the transaction with the veil of secrecy. This is one of the badges of fraud in Twyne's case. Twyne's case, Moore 638. The plaintiff may be considered in the light of a creditor of Bryant's, who, by being permitted to retain the possession contrary to both deeds, was thus enabled by the

plaintiff to gain a delusive credit, and thereby impose on third persons. From these special circumstances in the case my opinion is, that the plaintiff is not entitled to recover; for, had the transaction been fairly designed, it would have been perfectly easy to have accomplished every justifiable object, and to have provided, at the same time, for Bryant's enjoyment of the property.

I must acknowledge, that my mind hesitates in adopting the rule in the extent it is laid down at the bar, and as it is supported by respectable authorities, both British and American, that where possession does not accompany and follow the deed, it is fraudulent in law. Nor can I reconcile with that rule, the case of *Kidd* v *Rawlinson*, 2 Bos. & Pul. 59, where the title was in one person and the possession in another, yet it was left to the jury to decide, Whether, under all the circumstances, the transaction was fraudulent? Lord *Elden*, in giving his opinion in that case, cites Buller's Nisi Prius, 258, and adopts the doctrine, "the donor's continuing in possession, was not, in all cases, a mark of fraud; as where a donor lends his donee money to buy goods, and at the same time, takes a bill of sale of them for securing the money." There were certainly many strong circumstances in the case, tending to show that the transaction was fair, and that third persons could not be imposed upon by it; but if such circumstances can be enquired into, it proves that the terms, in which the rule is laid down in the cases cited, are too unqualified.

Daniel, J. The bill of sale made by Bryant to Gaither, and the bond bearing even date with it, which was executed by Gaither to Bryant, conditioned to reconvey the negro on Bryant's saving him harmless by paying the judgments which Pearson had obtained against Bryant, was, as between the parties to it, a mortgage, and as to them, it was quite immaterial whether the bond had been registered or not. *Erskine* v *Townsend*, 2 Mass T. R. 469.

But, as the bill of sale was absolute on its face, and recorded in this situation, without the defeasance, it is to be considered by all the rest of the world, as *absolute*. Were

that not the case, it would, in numberless instances, place creditors and purchasers in great perplexity and difficulty. It is more consonant to justice, that he who would take a bill of sale, in the way the plaintiff did in this case, should sustain the loss, than a *bona fide* purchaser under an execution, or from the vendor himself; who has been permitted to retain the possession.

To all the world but the parties, this bill of sale must be considered absolute; and, as the property did not follow and accompany the deed, the transaction is *per se* fraudulent. 2 Term 1 Crauch 309. 4 Binney 258. 9 Johns. 339. As the act was fraudulent, and void to all persons who were not parties to it, the circumstance of the defendant's having notice of both the bill of sale and bond to re-convey, can make no difference.

Ruffin, J. I do not think it necessary to decide the question raised in this cause, whether the possession of a chattel remaining in the mortgagor after the execution of the mortgage, constitutes, *per se* in point of law, a fraud; as I am of opinion that we are not to look upon this transaction as a mortgage. Between the parties to it, I suppose it would be such; but as to third persons, it clearly is not: The deed is absolute *upon the face.* In that shape, it is spread on record; the public see it so, and know, and can know nothing to the contrary; because the bond or defeasance, as it is called, is not an instrument, which the law directs or authorises to be registered. It is concealed, until the party is compelled to produce it, by a seizure of the goods by a creditor. It then comes to light, and contradicts what the deed has before said. Surely such a contrivance for entrapping innocent people, cannot be supported, under the notion that it forms a mortgage. In these two papers, different languages are spoken;—both cannot be right:—one of them must be false;—and take which you will, it equally is a fraud. This defeasance, to my mind, instead of making the vendor's possession consistent with his deed, and thereby fair, evinces his guilt, by making it more difficult to detect the fraud. It is a cover to a foul transaction, and not the evidence of a fair one. Even if the parties clearly intended a mortgage, they hav

so framed it, that to the world, it tells a falsehood; and the truth only to themselves. It is too late to disclose the truth, after the injury arising from the secrecy has been sustained. But it is said, that the defendant had notice of these deeds. That makes no difference. The law makes the deed void; and what is void, may be taken advantage of by *all* of Bryant's creditors.

Taking the deed to be absolute, upon the authorities cited by my brother DANIEL, and the case of *Hamilton* v *Russell*, 1 Cranch. Rep. it is fraudulent in law, and ought so to have been pronounced by the court.

Wherefore, there must be a nonsuit.

The rest of the court concurred.

NOTE.—Upon the first point, see *Hodges* v *Blount*, 1 Hay. Rep. 414 and the cases there referred to in the note, and the cases referred to in the note to *Ingles* v *Donaldson*, 2 Hay, Rep. 57, which shew that the possession not accompanying the title is only evidence of fraud, and fraud *per se*.

Upon the second point, see *Gregory* v *Perkins*, 4 Dev. Rep. 50. *Halcombe* v *Ray*, 1 Iredell's Rep. 340. *Newsom* v *Roles*, Ibid 179.

JORDAN *vs.* HOLLOWELL—Page 173.

Where a deed described a tract of land which was conveyed by it, and then followed these words, "one half acre of land where my grave yard is &c. is excepted. Together with forty five acres &c. also another tract containing fifty acres &c;" *it was held* that the grave yard only was excepted, but the two last tracts were granted.

This was an action of trespass *quare clausum fregit*, tried before DANIEL, J. at Hyde Superior Court. The plaintiff claimed under Ellison, to M'Swain, then being owner of the land, conveyed by a deed, in which he bargained and sold his plantation whereon he then dwelt, together with all houses and buildings, all orchards &c. it being part of a patent granted to Milnes. The boundaries of this tract of 200 acres are then particularly described; after which

follow these words, "one half acre of land where my grave yard is, which is at the end of my garden, and the privilege thereunto belonging, is excepted. Together with forty five acres lying on the front of the aforesaid land whereon the houses stand; reference to the patent for the courses of the same. Also another tract or parcel of land, containing fifty acres." The courses of the last tract are then described in the deed.

The trespass was committed on the two small tracts last described, viz. the forty-five acre and the fifty acre patent, which the defendant, who is heir at law to M'Swain the bargainor, contends were not conveyed to Ellison, but were excepted. The dwelling house, orchard, and grave yard, are in the forty five acre tract: but M'Swain had a part of each tract in cultivation, when he conveyed to Ellison.

The jury, under the charge of the court, found a verdict for the Defendant; and the plaintiff, upon his motion for a new trial being overruled, appealed to this court.

The case was submitted.

TAYLOR C. J. I have no doubt that the plaintiff derived title to all three of the tracts of land, under the deed to Ellison. Had the exception of the grave yard been connected with the part of the deed describing the forty-five acre tract no difficulty could have arisen as to the true construction; for it would then have corresponded with the office of an exception, and have been a saving out of the deed as to the thing granted. The ambiguity seems to have arisen from M'Swain's supposing that the grave-yard belonged to the 200 acre tract; he seems also to have thought that the plantation and orchard were on the same tract; the houses too, he conveys as part of the 200 acre tract, but afterwards describes them as belonging to the 45 acre tract. It is decisive that the 45 acre tract was granted, and not intended to be excepted; that M'Swain describes it as lying in front of the 200 acre tract. This repels every supposition that he might have thought it part of the other tract, and have believed it necessary to guard against its passing by inserting an excep-

tion. It not only could not pass by the words conveying the first tract, but it is impossible that M'Swain could have entertained such a belief. It was therefore altogether idle to have excepted it or the fifty acre tract. Upon the ground of intention, therefore I think the two small tracts were conveyed as well as the large one.

But even if M'Swain had intended to reserve the two small tracts, I think it may well be doubted whether the exceptions, expressed as they are, would not have been void. He conveys the houses, plantation, and orchards, in the most express terms in describing the 200 acre tract. The houses and orchard, it appears, are not on that tract, but on the forty five acre one; but the plantation is on all three. The exception then, if it were to be sustained, would go, as to the houses and orchard, to the whole thing granted. What proportion of the plantation is in the two small tracts, does not appear. Now it is a clear rule of law, that if an exception is repugnant to the grant and take away the fruit of it, it is void. If one grant his meadow and pasture lands, except his weadow lands, the exception is void. So if one grant two acres, excepting one of them, it is void. Shepp. Touch. 77.

I therefore think there ought to be a new trial.

RUFFIN, J. The plaintiff contends, that all the land mentioned in the deed passed thereby, except the grave-yard; and the defendant insists, that the tracts of forty-five acres and fifty acres are excepted. The deed is very inartificially drawn and obscurely worded. But that ought not to make any difference, if the intention of the parties can be discovered. That forms the true rule of construction of deeds as well as other instruments. And it appears to me, that the meaning of these parties is very obvious. M'Swain owned the three tracts of land described in the deed. They adjoined each other; and his cultivated land included parts of all of them. He resided on the forty five acre tract, where his houses and buildings and orchard were situate. In the deed he conveys (in terms of general description) his "plantation whereon he then dwelt, together with the houses and

buildings, all orchards, &c. thereunto belonging." He then proceeds, in a more particular manner, to describe the lands, —and says, "It is part of a patent to Milines, containing 200 acres;" and sets forth the boundaries. Then follows a clause in these words,—" One half acre of land where my grave yard is, which is at the end of my garden, is excepted. Together with." &c. And here it is said, for the defendant, that the word *together*, couples the forty-five acres with the grave-yard, and consequently, includes them in the exception. It is to be recollected, that the grave-yard is not on the Milines patent, but on the small tract. Then, I ask, why except the grave yard, if nothing more was to be conveyed but the Milines patent? Again; If the whole of the forty five acres were to be retained, why specially except the half acre, which formed a part of that tract? Moreover, he describes the fortyfive-acres as the parcel on which the houses stand; and it appears in evidence that the orchard is also there. The first general description *expressly* includes them. That surely would not have been the case, if they were not situated on a part of the land intended ultimately to pass by that deed, but on another tract, which was to be *entirely* excepted. From these circumstances, I am very clear, that the second tract is conveyed; and if so, the third also.

Wherefore, I am for a new trial.

The other Judges concurred.*

*Daniel, J. gave no opinion.

Note.—See *Wiggs* v *Saunders*, 4 Dev. & Bat. Rep. 480. See also *Sneed* v *Harris*, post 240, a case of a devise.

FREW, QUI TAM *vs.* GRAHAM—Page 176.

Where a person makes pig iron at his own furnace, which he works into bar iron at his own forge, the article is liable under the act of congress of 1815 for a distinct duty in each stage of its manufacture. The exemption of articles for the maker's own use signifies for his own consumption.

This was an action to recover the penalty of $500, under that act of Congress, for non-payment of the tax on a quantity of pig iron. The defendant was owner of a furnace, which he worked a part of the time between the 18th of April, 1815, and the 22d of February, 1816; in which time, he made 77,555 lbs. of pig iron; no part of which was made for sale, but the whole designed for his own use, to be made into bar iron at his own forge. The pigs were accordingly manufactured at the forge. The principal part of the iron was for sale, and the duty on that has been paid. The case was sent to this court, to decide whether owners of furnaces are liable to pay taxes for pig iron, where it is made by them into bar iron.

M'Kay, District attorney, for the plaintiff.

RUFFIN, J. delivered the opinion of the court:

Upon a view of the act of Congress of January, 1815, it appears to me, that a *distinct* tax is laid upon the manufacture of iron in its two stages of *pigs* and *bars*. The making of them, we understand to be separate businesses. It is true that they may, and probably are, very often exercised by the same man; but that makes no difference. So may the same person have a tannery and a shoe shop. But the act is explicit, that both the leather and the shoes shall pay a tax. In all these instances, it is to be recollected, that it is the article, and not the manufacturer, that pays. And it would seem strange, when the owner of a furnace makes pigs, one half of which he sells to a neighboring owner of a forge, to be made into bar iron, and the other half is manufactured into bars at his own forge, that in the former case two dollars should be paid per ton, and in the latter, only

one! I understand the articles exempted from duty as being for the maker's own *use* to mean for his own *consumption*, and not made for profit.

Let judgment be given for the plaintiff.

NOTE.—The act of congress upon which this action was brought, has been since repealed.

FENTRESS *vs.* ROBINS—Page 177.

Where a defendant at law might have had adequate relief, a court of equity will not sustain a bill filed by him for an injunction, on the ground that he did not attempt to prove a material fact, in consequence of the advice of his counsel that it was unnecessary,

This was a motion to dismiss a bill in equity, upon the ground, that the complainant might have made defence in the trial at law. The material allegations in the bill were, that the complainant purchased from Anderson a tract of land, for which he paid him promptly £120, and agreed to pay him £120 more in a twelvemonth. The complainant gave a penal bond, to secure the last payment, which he had reduced to £110. The complainant became surety for Anderson to one Hilsly, in two bonds amounting, together, to £90, and it was agreed, that upon his taking up those bonds the amount should go in discharge *pro tanto* of his penal bond to the defendant. The complainant did take up those bonds; and at the request of Anderson, paid to one Archer the further sum of £10.

Anderson afterwards joined the enemy, during the Revolutionary War, but knowing that the balance due him was only £10, desirous to guard the complainant against the payment of a greater sum, as no credits were indorsed on the bond, and anxious to secure what was due if he survived the perils which surrounded him, or that his wife and children might receive it if he fell, brought the bond to the

complainant and delivered it to him. Anderson was afterwards killed, and the complainant paid the balance to his widow, who was in great distress.

In 1782, administration of Anderson's effects was granted to Robins the elder, who had married his sister, and who knew all the circumstances relative to the bond and its payment, and who, although he lived many years, commenced no suit against the complainant. Upon his death, administration *de bonis non* was granted to the defendant who, upon some imperfect information, instituted the present action, which was decided in the County Court in favour of the complainant; but the defendant appealed to the Superior Court. While the suit was depending there, the defendant admitted to the agent of the complainant the payment of the money to Hilsly, but alleged, that it was in part of the first payment for the land. This the complainant was able to disprove, but was advised, that it was unnecessary to produce the bonds given to Hilsly, or to prove, that they were taken up; in consequenoe of which he did not produce them, having no witness to prove them or that they were taken up. Upon the trial of the suit, the complainant proved, that the money paid to Hilsly was not in part of the first payment for the land. He also proved the payment to Archer. Nevertheless, a judgment and verdict were rendered against him; the former for the penalty of his bond, which the defendant threatens to enforce. The complainant moved for a new trial; which was denied. He is now ready to produce the receipt given for the first payment, and the bonds to Hilsly. Upon the answer coming in, the injunction was dissolved; when a replication was entered and the bill continued as an original one.

Norwood, for the complainant.

Though this court will reluctantly interpose, after a verdict at law, where the defendant might have defended himself, yet, when the recovery is unconscientious, and that known to the plaintiff, Equity will relieve; as where a receipt from the plaintiff at law is found after the verdict. 2 P. Wms. 426. 2 Vern. 146. 2 Wash. 36.

RUFFIN, J. It is admitted by the complainant, that his case is one which might have been relieved at law, and the reason given why it was not, is, that he did not attempt, in a proper manner, to prove a material fact in the trial at law; having been advised by his counsel, that such proof was necessary. He now insists that it is in his power to make the necessary proofs, and prays to have an opportunity to do so here. In this point of view, the bill is an appeal to this court for a new trial in equity, If a new trial had been proper, the court of law was entirely competent to grant it. It is a subject of the ordinary jurisdiction of those courts. But the complainant further says, that he did move for a new trial and was refused; and this refusal is made another ground for coming into this court. In this respect, the bill is for relief against the *errors* of the judgment at law.

If these facts laid any foundation for a suit in Equity, there would soon be an end to all proceedings at law. Upon one or other of these points, either to hear *errors* of the court or *re-try the facts* falsely found by the jury, all causes would end in chancery, and the courts of Common Law be abolished.

It is unnecessary to say, whether the opinion of the Superior Court was right or not; though it may well be doubted whether the mistake of counsel upon a point of law, as stated in the bill, forms a ground for a new trial: *Zachary* v *Lester*, in this court. Whether right or wrong, a court of equity is not to hear errors or reverse judgments at law. The case of *Ambler* v *Wild*, 3 Wash. Rep. 36, has been cited by the defendant; and it must be admitted, that it goes the full length of the present case. But that decision is a solitary one and I cannot allow to it the authority of overturning a long train of contrary decisions and the oldest and best established maxims of our law.

Courts of law and courts of equity are both eminently useful, and, perhaps, alike indispensable. But they are very differently constituted, proceed by different modes, take cognizance of different subjects, and are intended for different purposes. In their original organization, their jurisdictions

are separate, and it appears to me that their utility can only be preserved by keeping them unblendid.

I am, therefore of opinion, that equity ought not, in any instance, to interfere, where a competent relief *might* have been had at law ; and, consequently that

The bill must be dismissed

The rest of the court concurred.

NOTE.—*Brickell* v *Jones*, 2 Hay. Rep. 357, and the cases referred to in the note to *Taylor* v *Wood*, Ibid 332.

McKENZIE'S EX'RS *vs.* HULET—Page 181.

A grant of land covered by an arm of the sea only at high water, will entitle the grantee to an action of tresspass *quare clausum fregit*, for taking oysters from the rocks within the grant.

In an action of trespass for entering the plaintiff's close and taking his oysters and making profit of the shells, the proper rule of damages is the clear profit made by the defendant.

This was an action of tresspass *quare clausum fregit*, tried before SEAWELL, J. at New-Hanover Superior Court ; plea, not guilty, and a special justification that the *locus in quo* is an arm of the sea, &c. The facts were, that the plaintiff's testator claimed under a grant. The defendant had taken oysters, in the lifetime of the testator, from the oyster-rocks included within the lines of the grant, which rocks, and the earth on which they grow, are covered with water at high tides and bare at low tides, and extend from the main land to the banks which separate the sound from the Ocean, occasionally interrupted by marsh land and channels for the water. The navigation of the sound, even for small boats, is almost impracticable, except at flood tide, when the oyster-rocks, being covered, the communication between the different parts of the main is more direct. The main land along the western boundary of the grant is the

property of different persons. The banks included in the grant are not covered by highwater, but the marshes generally, but not entirely, are. The channels through the Sound and between the marshes and oyster-rocks are frequently changed by violent storms and new channels broken through the oyster-rocks. The defendant was in the habit of making a profit from burning the shells taken from these oyster-rocks.

The Court, under the evidence, instructed the jury that the defendant had committed a trespass, and directed them that the amount of the damage sustained by the plaintiff was the clear profit made by the defendant. The jury found accordingly; and a new trial was moved for on the ground of misdirection as to both the points.

The case was submitted without argument.

TAYLOR, C. J. This case does not call for an opinion as to the right of every citizen to fish in an arm of the sea, but only as to the right of taking oysters within the bounds of another's patent although between the high and low water marks. These rocks form, in many instances, a part of the permanent value of the freehold, become the source of profit to the owner by converting the shells into lime, and are sometimes the foundation of lucrative establishments, of which *Shell Castle* is an instance. The right of taking fish in the sea, or the arms thereof, belongs to every one as a common of Piscary; but even this may be restrained, where an individual hath gained exclusive property. Hale, de Jure Maris, 11. And this may be acquired by grant or prescription, Ibid 43; but it being considered as a royalty, it would not pass without special and express words. 2 Bl. 39. Where a grant abuts upon the sea or a navigable river, it stops, according to the common law, at the ordinary high-water mark; and the shore, that is, the ground between the high and low water marks, belongs of common right to the king. Hale de Jure Maris 12. But it seems to be well settled, that, whatever is below the highwater mark may be granted by the king, of which many instances are put in the book already cited. The charter of Car. 11, to the lords'

proprietors is an illustration of the form used by the crown in the grant of royalties. As the grant under which the plaintiff claims, actually takes in these oyster-rocks, I am of opinion, that as to them, he has an exclusive property, and that the defendant has committed a trespass in taking them away. In a late case, the common law right to take sea-fish is recognized, subject however to abridgement or restriction; but the courts say, as no case has been cited to support the claim of taking shells, they would pause before they established it. *Bagott* v *Orr*, 2 Bos. & Pul. 479.

Daniel, J. The rocks and marshes in the Sound, which are covered with water at flood tides and bare when the tides ebb, are subject to the operation of the entry laws. "The shores may not only belong to subject in gross, which may possibly suppose a grant, before the time of memory, but it may be parcel of a manor." 5 Co. 107, Sir Henry Constable's case. So it may be parcel of a ville or parish. Ba. Ab. Prerogative, B. 3. The Parson of Sutton, about the 14th Car. 1, had a verdict for the tithes of Sutton Marsh in Lincolnshire, although it was the main shore of the sea, covered at ordinary tides, and without the old sea banks. 4 Bac. Ab. 499. (Gwill. Edit.) Batture case. *Livingston* v *Jefferson*, Law Journal.

I do not see any inconvenience the public can sustain in permitting the place mentioned in the present case, to be patented. The navigation is not, nor cannot be obstructed, by works or fixtures which the plaintiff may place upon it. 1 Hayw. 489.

On the second point, I am of opinion, the charge of the court, as to the grounds upon which the jury should assess the damages, was correct.

The rest of the court concurred.

Seawell, J. gave no opinion.

Note.—See on the first point, *Jones* v *Jones*, 1 Hay, Rep. 488. *Satum* v *Sawyer*, 2 Hawks 226.

BOZMAN *vs.* ARMISTEAD AND FESSENDEN.—Page 183.

By the act of 1810, (1 Rev. Stat. ch. 32, sec. 13,) bonds given upon obtaining injunctions are put upon the same footing, as to the mode of enforcing them, as appeal bonds, and the proper mode of proceeding upon them is by *sci. fa.*

Scire Facias, issuing from the Court of Equity, aginst the defendants, as securities and co-obligors in a bond given by Morrison, on obtaining an injunction against a judgment at law, recovered by Bozman.

The defendants demurred, on the ground that the remedy on the bond was at law, by an action of debt.

The case was submitted, without argument.

TAYLOR, C. J. The act of 1810, c. 10, regulates the proceedings in this case. It prescribes the remedy on the bond which the act of 1800, c. 9, had previously required to be taken. The bond is to be proceeded on "in the same manner, and under the same rules and restrictions, that bonds are proceeded upon in cases of appeals from the County and Superior Courts." The act of 1785, c. 2, directs appeal bonds to be made part of the records sent up to the Superior Courts, and allows judgment to be entered up *instanter*, against the appellant and his sureties. The construction of this act has been, that the appellee, if he do not think fit to enter up judgment on the appeal bond at the Term the cause is decided, may have a *scire facias* to bring the obligors in at a future Term. This is the method pursued in the present case.

There must, therefore, be judgment for the plaintiff.

SEAWELL, J. The act of 1810 places bonds given upon the obtaining of injunctions, as to the remedy of enforcing them, upon the same footing with bonds in cases of appeal from the County to the Superior Courts. Upon appeal bonds, the Legislature has declared, there shall and may be judgment upon motion; and has also given to them the quality

of a record, by declaring that they shall be made part thereof. The effect thence resulting is, that being *part of a record*, a *scire facias* will lie to enforce them. The remedy upon these bonds, being declared the same as those referred to, it follows that a *scire facias* will lie; and, consequently, that

The demurrer must be overruled.

The rest of the court concurred.

NOTE.—See S. C. post 264, and 2 Murph. Rep. 328. An action may also be maintained upon such bonds, *Casey* v *Giles*, 1 Dev. & Bat. Rep. 1.

BENJAMIN PERRY'S HEIRS AND DISTRIBUTEES *vs.* POLLY PERRY—Page 184.

Where an undue allowance of a year's provision is made to a widow, a distributee of the estate is entitled to a *certiorari*, because the act of Assembly recognizes his right, *quoad hoc*, as a legal one.

Every person affected in interest by an *ex parte* proceeding in an inferior court, shall have, upon a proper case, a writ of *certiorari*. Their rights shall not be concluded by an *exparte* transaction; but they shall have an opportunity of a trial; and as the writ of *certiorari* is the only remedy, they shall have that. The year's provision to which a widow is entitled under the act of 1796, (1 Rev. Stat. ch. 121, sec. 18 & 20,) is for the easy and comfortable subsistence of *herself and children*, and their necessary servants or attendants; and not for the support of the slaves and stock which she obtains as her part of her husband's estate, or otherwise acquires after the death of her husband.

Benjamin Perry died intestate and without issue, leaving a widow, Polly Perry, to whose brother, George Murphy, administration was granted by the County Court, September Sessions, 1815. The widow filed her petition praying an allotment of a year's maintenance out of the crop, stock, and provision; upon which commissioners were appointed, who allowed the widow the sum of eleven hundred dollars; thus providing, not only for the family she had at the death of

her husband, but also for twenty-nine negroes, acquired by her on a division of the property which took place by the consent of the heirs and the representatives, shortly after the administration was granted. When the report was returned to the County Court, J. Perry, one of the distributees and agent for the others, called upon the administrator to oppose its confirmation, but he refused to do so, or to appeal. J. Perry then moved to be made a party, and prayed an appeal, which was refused. He then applied to TAYLOR, C. J. for a *certiorari*, upon an affidavit, of which the preceding facts form the substance. The *certiorari* was allowed, and the case coming on before SEAWELL, J. at Franklin Superior Court, it was by him referred to this court.

Nash in support of the *certiorari*.

The only difficulty with the court appears to be, whether the *certiorari* will lie; as to which it is a rule, that a writ of error is proper only where the proceeding is according to the course of the common law. Every inferior court must keep within the limits of its jurisdiction, and their records are removable at all times to the Superior Courts, that they may be inspected and the judgment of the court ascertained. 1 Salk. 144. Unless this writ is sustained, there will be no remedy for the most evident wrong; for the portion allotted to the widow by the act, is exonerated in express terms, from the claims of distributees and creditors. Act 1796, c. 29, § 3.

RUFFIN, J. delivered the opinion of the court:

My doubts in this case, were, at first, considerable,—whether the plaintiff could have a *certiorari*. But, upon further consideration, and on examination of the act of Assembly of 1796, c. 29, I think he can. The act evidently contemplates an *ex parte* proceeding. It does not direct any process or notice to the administrator; and, indeed, from the nature of the thing, no notice could be given to the administrator; because the widow's petition is to be filed at the same court that letters of administration are granted. Indeed, it must have been well understood by the Legislature, that if an adversary suit was prescribed between the widow and the administrator for her year's allowance, the provision in-

tended for her by the act, would most commonly fail, and the act be nugatory;—For she herself is entitled to administration and generally does administer, and she could not sue herself. But the allowance given by the act is not made to depend on her administering or on another's doing so. It is given from the necessity of the case and was intended to relieve her immediate wants. She is equally entitled to it in both instances. And I think that it may be laid down as a safe rule, that every person affected in interest by *ex parte* proceedings in an inferior court, shall have, upon a proper case, a *certiorari*. Their rights shall not be concluded by an *ex parte* transaction; but they shall have an opportunity of a trial, the writ of a *certiorari*, being the only remedy they shall have that. Another objection occurred, however, to me, upon this part of the case: and that was, whether the *next of kin* have such an *interest* as gives them the right to the writ. A distributive share is not, properly speaking, a legal right, but an equitable one. It is a trust, and a Court of Law cannot take notice of it. Upon this ground, I should have perhaps been against allowing the writ. But the act itself takes notice of their interest, by expressly exonerating the administrator from accountability for the amount of the allowance to the "claimants upon the estate of the deceased *as* creditors." The *claimants* here spoken of are clearly contradistinguished from *creditors*, and plainly mean the next of kin; whose interests are thereby made, *quo ad hoc*, legal rights, which this court can protect.

Upon the other point, whether the allowance made in this case, was a proper one, I have no doubt. It never could have been intended that the widow should be allowed a support for her slaves and stock which she obtained, as her part of her husband's estate, or otherwise acquired after the death of the husband. Indeed, the allowance is generally made long before administration of the intestate's estate takes place, and, therefore, could not embrace her share thereof. The act contemplated a relief to her immediate and pressing necessities. But the construction contended for, in her behalf, would make her wealth and ability to re-

lieve her own necessities without assistance, a ground for a larger claim. The true construction of the law seems to me to be, that the widow shall be allowed a reasonable, that is, an easy and comfortable subsistence for *herself and children* and their necessary servants or attendants. It was not intended to include any other persons; for although the second section speaks of her *family*, by the third section the allotment is vested in the widow for her own use and the use of her *children*. What may be a reasonable allowance, cannot be precisely defined. No certain rule can be laid down, as it must depend on the mode of life of the family, and the situation of the estate. That allowance, in this case, is so far beyond bounds,—so palpably extravagant and bottomed on such a wrong construction of the law,—that it must be set aside and a new one made.

NOTE.—Upon the question of the *certiorari*, see *Dougon* v *Arnold*, 4 Dev. Rep. 99. *Swaim* v *Fentress*, Ibid 601. *Allen* v *Williams*, 1 Hay. Rep. 17. *Fryar* v *Blackmore*, 1 Murph. Rep. 94. *Betts* v *Franklin*, 4 Dev. & Bat. Rep. 466. *Petty* v *Jones*, 1 Iredell's Rep. 408.

LASPEYRE *vs.* McFARLAND—Page 187.

Trover cannot be maintained on the possession of a chattel, where it appears that the legal title is in another, and that the plaintiff has only a trust.

Trover for a slave, of which the plaintiff had been in possession for fourteen years. The defendant showed no title in himself, but offered in evidence a marriage settlement entered into by the plaintiff, his wife, and William Davis, whereby this slave among others, was conveyed to Davis as a trustee, to permit the wife of the plaintiff to have the labor and profits, and to allow the slave to be under the direction of the plaintiff. The plaintiff was nonsuited in the Superior Court, and a motion to set the nonsuit aside, was referred to this court.

M'Kay, for the defendant.

Property, either general or special, is necessary to maintain trover. The plaintiff has but an equitable title, which the court cannot notice. The legal title is by the deed vested in Davis, the trustee. 11 Johns. 7 T. Rep. 43. 2 Esp. Rep. 500. 2 Stz. 1078. 2 Johns. 221. 6 Term 684.

Mordecai. The defendant relies upon no title, and must, therefore, be taken as a stranger and wrongdoer, against whom the plaintiff has a sufficient property to maintain trover. Even possession alone is sufficient for this purpose, and here it is expressly stated to have been, with the permission of the owner. 5 Coke, Palmer's case Cro. Eliz. 819. 2 Saun. 47, c.

RUFFIN, J. delivered the opinion of the court:

This is an action of trover for a negro slave;—and the question is, whether it is the proper action or not? By the marriage settlement, the title of the slave is in the trustee, who permitted the plaintiff, however, to have the possession. It is one of the characteristic distinctions between this action and trespass, that the latter may be maintained on possession; the former only on property and the right of possession. Trover is, to personals, what ejectment is as to the realty. In both, title is indispensable. It is true, that as possession is the strongest evidence of the ownership of chattels, *property* may be presumed from possession. And, therefore, a plaintiff may not, in all cases, be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption, against a wrongdoer. Yet it is but a presumption, and cannot stand when the contrary is shown. Here it is completely rebutted by the deed, which shows the title to be in another and not in the plaintiff. As to the plaintiff's interest under the deed, that is only a trust, and we cannot take notice of it. It is nothing here. A Court of Law can only regard *legal* rights; and if the plaintiff wishes to come into this court, upon his title, he must get the aid of his trustee, and proceed in his name.

Wherefore, I think the nonsuit must stand.

NOTE.—See *Hostler* v *Skull*, 2 Hay. Rep. 179, and the note thereto.

GRAHAM *vs.* LOWRIE—Page 189.

Where an usurious agreement is made in this State, but the illegal interest is received in South Carolina, an action will not lie for the penalty.

This was an action upon the statute of Usury. The plaintiff and defendant both resided in the county of Rutherford, and resided there long before the circumstances hereafter mentioned, took place. The plaintiff owned a tract of land with a mill thereon, worth at the time of the contract $1000, in the State of South Carolina. The plaintiff obtained, on loan from defendant, the sum of $600 for six months, for which he was to pay at the rate of twelve per cent. To secure the repayment of the $600, together with $36 the usurious interest, the plaintiff agreed to make an absolute conveyance in fee simple, for the mill and lands in South Carolina; and it was further agreed, that the plaintiff should keep possession of them for six months, the term of credit agreed on. If at the end of six months, he repaid the consideration money mentioned in the deed, viz. $636; the defendant was to reconvey the land and mills. If he failed to pay, the defendant was to enter on and hold them as his own absolute property, according to the tenor of the deed.

The contract was made between the parties at the house of the defendant, in Rutherford county. The deed was signed in South Carolina, where the parties went to have it executed. The sum of $100, part of the $600, was paid in South Carolina, at the time the deed was executed. A part had been advanced in Rutherford, at the time of making the contract, and the balance was paid in Rutherford, after the execution of the deed.

The plaintiff kept possession of the land and mills for six months after the contract, and not paying the $636, the defendant entered, and has had possession of them and the profits ever since. In this the plaintiff has acquiesced; nor has he repaid the money and the interest reserved thereon,

or offered to pay the same in any other manner than by giving up the land aforesaid to defendant, who holds the same under the absolute deed aforesaid.

The jury found for the plaintiff the amount of the penalty sued for. The defendant moved for a new trial, on the ground that the facts do not, in law, subject him to the penalty. Which being overruled, he appealed, &c.

The cause was tried before CAMERON J. at Rutherford Superior Court.

Browne, for the defendant.

This action is founded on our Statute of Usury; not on that of South Carolina. The latter is not set forth, and being a penal statute, we could not take notice of it if it was. 3 T. R. 783, per Bul. 735. 4 T. R. 184.

It must be admitted, that our laws are not in force in South Carolina; and it must also be admitted, that as the land lay within the territorial jurisdiction of South Carolina, the laws of that State exclusively regulate the transfer of it.

The *lex loci* of the transaction governs a challenge in this State, and if they go into South Carolina to fight, for the express purpose of evading the law, and do fight, they are subject to our law for having given or received a challenge, but not for the assault or intent to kill or for the homicide, if one ensues; for they were not then and there in the peace of God and this State, because its peace extends no further than its boundaries.

Scotch marriages are good, notwithstanding what was said by Lord *Mansfield*, in 2 Bur. 1079. Vide Co. Lit. 79, b in notis. 2 H. Bl. 412, per Eyre. So the *lex loci* governs interest on contracts. 2 Bl. Com. 463. 1 Eq. Ca. ab. 288. 2 Vern. 395. There is nothing more common in this State. A merchant in New York and one here, have accounts current. By that merchant shipping goods according to order, and the one here shipping produce to be applied to his credit when disposed of, the balance is sometimes on one side and sometimes on the other; and it is the duty of the debtor to look out for his creditor; so that

when the balance was in favour of our merchant, the money was to be paid here, yet interest on both sides at 7 per cent. because the contract was here.

The only exception that occurs to me, is the case of lands which are regulated according to the law of the country where they lie. Therefore, if there was any offence committed it was against the law of South Carolina and not North Carolina. 1. But if the transaction had taken place in North Carolina, no action could have been supported under our statute. It first makes all assurances, &c. *utterly void*; and the deed being only an assurance, &c. it is utterly void, and the defendant when he entered, was a tresspasser as much as if he had no deed. If he had had no deed and had entered, he would not have been liable to the penalty in the statute, although there might have been a usurious contract between them before, and this is the same thing. 2. The statute speaks only of taking money, *six pounds* in the hundred. No case can be found where any thing else has been taken but money, &c. If this is not so, he might recover the penalty first, and then the land; and *so* the defendant would be subject to the operation of both branches of the statute.

Taylor C. J. Usury is, in a peculiar degree, an offence of positive law; because the rate of interest depending upon local and domestic considerations, is established in every country, with a single view to its own advantage. It is accordingly different nearly in all the States by which this is bounded, and hence it would be equally mischevous in practice and absurd in principle to test a transaction occuring in one State by the standard of criminality established in another. From the facts in this case, it is evident, that the penalty was not incurred in this State, for the illegal interest was not actually received until the defendant obtained possession of the land, even upon the supposition that the usury was then complete. But this might admit of doubt, if it were necessary to enter into that question, considering that the right of redemption still remained in the plaintiff. I cannot think that any difference is made in the case by the circum-

stance of the parties being citizens of this State and making the corrupt agreement here. There are some opinions to the contrary, but the principle recognized by the common law is, that the criminal and penal laws of a State, have force only within its limits, and are not obligatory upon persons in another government. This has been decided in this State, even where an act of Assembly was passed for the purpose of punishing a crime committed out of the State. *State* v *Knight* 1799.

I am, therefore, of opinion, that there ought to be a new trial. The rest of the court concurred in awarding a new trial.

HULIN *vs.* BILES—Page 192.

The penalty under the act of 1741, for mismarking cattle cannot be incurred, unless the offence be wilfully done.

This was a warrant to recover the penalty of £10, imposed by the act of 1741, c.—, for mismarking one of the plaintiff's cattle. The defendant insisted, by way of defence, that he had done it ignorantly; believing, at the time, that the cow belonged to himself. And sundry witnesses were examined, to prove that not only the defendant, but others, believed the cow belonged to him. There was evidence, on both sides, as to the identity of the cow.

His Honour who tried the cause, charged the jury, that the defendant had incurred the penalty by mismarking the cow, although he believed, at the time, that the cow belonged to himself.

The jury found for the plaintiff; and a rule being moved for, that the plaintiff show cause why a new trial should not be granted, on the ground of misdirection by the Court.

SEAWELL, J. delivered the opinion of the court:

From the whole complexion of the act, it is evident, that it was the fraudulent conduct of a party, the Legislature intended to punish. For this case is connected with a case of stealing. The affair, therefore, which the Legislature intended to put down was, that of *wilful* mismarking, and we should be imputing to them a motive which nothing short of positive declaration could justify, were we to suppose they, in any case, intended to inflict a penalty upon an innocent man, who was acting *honestly* upon a total mistake as to *facts*.

The case of *Smith* v *Howard*, decided by this court, is an authority in point. Where it was held, that a purchaser of a slave brought into this State, if he was acting honestly and ignorant of that fact, was not liable to pay the penalty.

New trial granted.

NOTE.—This offence is now punished by indictment in the same manner as petit larceny. 1 Rev. Stat. ch. 34, sec. 55.

McILWINN'S ADM'R DE BONIS NON *vs.* CARRAWAY—Page 194.

Where a slave in the hands of an administrator *de bonis non* was taken in execution and sold for a debt due from two of the next of kin and legatees, and was delivered by the officer to the purchaser; *it was held* that the administrator might sustain an action against the officer; for that the slave was not liable to execution under the act of 1812 (1 Rev. Stat. ch. 45, sec. 4) which affected only express trusts and not equitable interests in the nature of trusts.

The defendant, a constable, had an execution against John M'Ilwinny and his mother, who were next of kin and legatees of the testator, and who under the act of Distributions were entitled to part of the intestate's estate. Under this execution, the defendant levied upon a slave which belonged

to the testator, and which was in the hands of the plaintiff as assets. There were no debts due from the testator. The slave was purchased by a stranger and delivered over to him by the defendant after the sale. The defendant gave in evidence, that only the right of the defendants in the execution was sold. The jury, under the direction of the court gave the full value of the slave; and, upon a motion, by the defendant, for a new trial, the case was referred to this court.

Browne, for the defendant.

As there were no debts due from the testator, the plaintiff held this slave as trustee for the next of kin or legatee. So far, therefore, as the defendants in the execution were entitled to a share, it was liable for the payment of their debts. It was a chattel possessed by the administrator in trust for those against whom the execution issued; and is therefore, made liable, by the very words of the statute. 1812, c. 4. The property was sold in the only way that joint property can be disposed of, viz. by seizing the whole, and selling the slaves undivided; which makes the vendee tenant in common with the other distributees. 1 Salk. 392. 2 Ld. Raym. 871. Doug. 650.

The act of Assembly is much broader than the statute from which it was partly copied; for it embraces chattels and equities of redemption. The latter clause was probably added to put an end to the doubt, whether the trusts described in the former clause extended to them. 1 Ves. jr. 433.

Henry, the for plaintiff.

The design of the act was solely to enable the purchaser to go into a court of equity, to procure his title to be completed by a conveyance from the trustee. It makes express trusts, and not implied or constructive trusts, liable;—otherwise, the second clause of the act, subjecting equities of redemption to execution, would be nugatory. In this case, the purchaser can only stand in the shoes of the legatee. His title cannot be better than hers was: But she could not be preferred to the creditors; therefore, the purchaser cannot. The distributee, in this case, took only an undivided part

with others in the will, and the act says, the properyt so levied upon, shall be transferred to the purchaser, free from all incumbrances. The effect then would be, that the purchaser must hold the property exempt from the shares of the other distributees, which is absurd.

SEAWELL, J. The legislature, in passing the act of 1812 clearly understood that all equitable interests were not included, and thereby subjected to sale at execution; for they add a separate clause, to render liable equities of redemption.

This act is literally copied from the 29th of Car. 2, including personal estate, which was not within the statute of Charles. In construing that act, the courts held, that it did not extend to an equity of redemption: and this our Legislature seems to have been apprised of, from the circumstance of the additional clause. At all events, it would seem, that the Legislature were aware that the statute, when adopted, would retain the same construction which had been put upon it. It, therefore, does not extend to every species of equitable interest in the nature of a trust; but the difficulty is in defining, distinctly, its limits. The case of *Lyster* v *Dolland*, Ves. jr., is, at best, but a dark one. The Chancellor assigns no reason why an equity of redemption is not extendable; but contents himself with saying, that at first, he had supposed the words of the statute were much larger, namely, that they were "equitable interests," but upon reading it, finds his mistake, and that it does not extend to an equity of redemption. The design of the Legislature certainly was, to free and discharge those equitable estates from the control of the legal holder, when, by so doing, no injury or inconvenience was to be produced to others; for, in a case where their meaning is not clear nad definite, we are bound to put such construction upon their acts, as shall be consistent with justice and reason. The effect of determining that the interest of the next of kin, is liable, under this act, would be, entirely to exclude the claim of creditors and other next of kin, or of annihilating the administrator, (at least *pro tanto*), and substituting in his stead as many

trustees for the creditors and next of kin of the deceased, as there should be purchasers of the property sold, and that without any security but their own solvency. This would be so monstrous and would produce such confusion in the manner of applying and accounting for the assets, as should, without clear and manifest intent, prevent such interpretation. And it makes no difference that there were no debts, for the essential quality of the estate is the same, whether there be debts or not. And, moreover, the next of kin can, in no instance, receive his ratable part, without giving the refunding bond required by an act of Assembly. Were it not that the act declares the purchaser shall hold the estate "free and discharged" from the incumbrance of the trustee, I should have thought there was no difficulty, and that the purchaser would have acquired precisely what the defendant in the execution had, and stood in his shoes; in which case, the legal dominion of the property must remain with the administrator till compelled to surrender it. And, possibly, this may be still the sound construction. But as to that, I will give no opinion. I should think, however, that the fair construction of the act was only to affect express trusts and leave undisturbed those equitable interests in the nature of trusts. In whatever way the case is considered, it appears to me

There must be judgment for the plaintiff.

HALL. J LOWRIE, J. DANIEL, J. and RUFFIN, J. were of the same opinion.

TAYLOR, C J. gave no opinion.

NOTE.—See *Dozier* v *Muse*, 2 Hawks, 482. *Moore* v *Duffy*, 3 Hawks 578. *Browne* v *Graves*, 4 Hawks 342. *Harrison* v *Battle*, 1 Dev. Eq. Rep. 537. *Mordecai* v *Parker*, 3 Dev, Rep. 425. *Gillis* v *McKay*, 4 Dev. Rep. 172. *McKay* v *Williams*, 1 Dev. & Bat. Eq. Rep. 398. *Camp* v *Coxe*, 1 Dev. & Bat. Rep. 52. *Henderson* v *Hoke*, 1 Dev. & Bat. Eq. Rep. 119. *Tharpe* v *Ricks*, Ibid 613.

WILLIAMS *vs.* SHAW—Page 197.

In an action of covenant for quiet enjoyment, a recovery of damages in trespass *quare clausum fregit*, is sufficient to amount to a breach.

The judgment in such action is evidence to show the eviction, but is not conclusive against the warrantor as to the title of the land.

The defendant sold to the plaintiff a tract of land; for which he executed a deed, containing this warranty: "And the said John Shaw, for himself, his heirs, and executors, will forever warrant and defend the said land against the lawful claim or claims of all persons whatsoever." The land being unoccupied, the plaintiff cut down some timber and carried it away; on which an action of trespass *quare clausum fregit* was instituted against him by one M'Kethan; of which suit, due notice was given to the defendant. The plaintiff resisted the claim of M'Kethan, for whom a verdict was found under the direction of the presiding Judge; and soon afterwards this action of covenant was brought on the preceding warranty. The declaration stated the suit and judgment of M'Kethan and his title paramount. To this declaration there was a general demurrer.

M'Millan, in support of the demurrer.

This is a covenant for quiet enjoyment, in which no breach can take place without an actual eviction by a person having a better title than the defendant. A recovery of damages merely, in a case where the title does not necessarily come in question, and where the plaintiff may recover without actual possession, cannot be equivalent to an eviction. The covenant extends only to those who have title; but possibly M'Kethan might have a right to recover damages without having such title as would enable him to recover in ejectment.

Henry, *contra*. It is not essential in this action to state or prove an eviction by process of law. 2 Saunders 181, note 10. 4 Term 617. The covenant is broken by any

disturbance of the possession, Cro. Eliz. 421; and the judgment under the circumstances of M'Kethan's action is a sufficient eviction; for as such an action may be brought in this State on a constructive possession, M'Kethan might bring it *toties quoties*.

There is another point on which the opinion of the court is desired, viz. whether M'Kethan's judgment is plenary evidence to support the covenant upon, and to exclude the defendant from showing a paramount title in himself. It is contended on behalf of the plaintiff that such judgment is conclusive, unless impeached on the ground of fraud. 4 Tyng. 348. 4 Binn. 352. 4 Dallas 436 in note. 6 Johns. 158. 3 Term 337. 1 Johns. 517.

Taylor, C. J. It is a general rule that a covenant for quiet enjoyment is not broken without an eviction by better title; but it is wholly immaterial whether the eviction is effected by legal process or by private disturbance and molestation. This point was made in one of the cases cited for the plaintiff, but afterwards abandoned as untenable. But if a legal recovery were necessary, I should not hesitate in considering the judgment in an action of trespass *quare clausum fregit*, as effectual for that purpose; because it is, in this State, a common and convenient mode of trying the title to land, of which there is no actual possession; and because enough appears in the averments of the declaration and the statement of facts, to satisfy me, that the title was put in issue in that very suit. It would be a strange method of warranting a title to land, to leave the purchaser exposed for ever, to a legal claim of damages whenever he exercised the least act of ownership over it.

With respect to M'Kethan's judgment, it must be proper evidence to a certain degree, in order to show the eviction; but I think it has been decided by this court in the case of Shober that it is not conclusive upon the seller so as to prevent him from showing in an action upon the warranty, that he has in fact a better title than the recoveror.

Daniel, J. It is contended in support of the demurrer, that the covenant contained in the deed, is nothing more

than a covenant for quiet enjoyment, and as there is no allegation in the declaration, of an entry and eviction under a lawful title, by legal process, the plaintiff is not entitled to maintain his action. It is a well settled rule, that under a covenant of warranty the plaintiff must show a lawful eviction in order to maintain his action. 2 Johns. Rep. 4. 3 Johns. 473. 7 Johns. 258. 11 Johns. 122. And the plain reason is this, if the eviction is not lawful, by some person having a better right to the possession, the covenantee would always be able, through the medium of the Courts of Justice, to maintain his possession and recover damages for the interruption; but if the eviction is lawful, the covenantee has no other remedy but on his covenant for quiet enjoyment. Ibob. 34, 35. Cro. Eliz. 914. Cro. Jac. 425. If the parties had inserted a covenant of *seisin* in the deed, and a breach had been assigned on that covenant, the case would have been very clear. We are now called on to say whether there does not appear sufficient in this case to authorise the plaintiff to recover on the covenant contained in the deed, under the circumstances attending it; or, in other words, whether it was necessary for the plaintiff to allege and prove that he had been evicted by a legal title in an action of ejectment. It appears by the case, that the plaintiff by virtue of the deed entered upon the land and had some timber cut and carried away; and the declaration states that M'Kethan, by a better title, entered and held him out of possession. On an examination of the British authorities, it does not appear to be necessary for the plaintiff to show an eviction, in consevuence of an action brought against him, and a recovery; it is sufficient, that he state in his declaration, that he was turned out of possession by one who had the legal title. 4 Term 617, 620. 2 Wms. Saunders 181, note 10. In the present case the title was fairly tried, the defendant, (I Shaw) had notice to defend; whether he did or not, does not appear from the case. The land being woodland, and no actual possession, the possession then followed the title, and that the Court and Jury said was in M'Kethan. This is equivalent to an eviction under legal process.

RUFFIN, J. I am of opinion that the recovery in the action of trespass against the plaintiff, as set forth in the declaration, is such a *disturbance of his possession* as will form a breach of the defendant's covenant for quiet possession—In that respect it is tantamount to an actual eviction—But like an eviction, it must be upon prior and paramount title to enable the plaintiff to recover—Here such a title is stated in the declaration and admitted by the demurrer—Wherefore I think the demurrer must be overruled.

NOTE.—Upon the first point, see *Coble* v *Wellborn*, 2 Dev. Rep. 388. *Grist* v *Hodges*, 3 Dev. Rep. 198. *Cowan* v *Silliman*, 4 Dev. Rep. 46. *Clapp* v *Coble*, 1 Dev. & Bat. Eq. Rep. 177. Upon the second point, see *contra Wright* v *Walker*, 2 Hay. Rep. 16, and *Garland* v *Goodloe*, Ibid 351. which are however overruled by the cases of *Saunders* v *Hamilton*, 2 Hay. Rep. 282. *Pearse* v *Templeton*, Ibid 379. *Shober* v *Robinson*, 2 Murph. Rep. 33. *Coble* v *Wellborn*, 2 Dev. Rep. 388, and *Martin* v *Cowles*, 2 Dev. & Bat. Rep. 101.

SMITH *vs.* BOWELL—Page 200.

Where the plaintiff sued out sixteen warrants against the defendant upon *due bills*, the highest of the warrants including only four dollars, the court, on motion, refused to consolidate the warrants, principally on account of the policy of the act against due bills.

The plaintiff took out sixteen warrants against the defendant, fifteen of which were for four dollars each, and one for two dollars, upon due bills issued by him, all of the same tenor and date, but for different sums, the highest of which was twenty-five cents, and the lowest two and a half cents. Upon the causes being taken by appeal to the County Court, an order was there made to consolidate them into two, from which Smith appealed to the Superior Court of Cumberland, where upon the motion to consolidate being made before SEAWELL, J. he refused it, and directed a *procedendo*

to issue to the County Court, from which judgment Bowell appealed to this court.

Shaw, for the appellant.

The plaintiff might have comprised all his causes of action in two warrants, without any inconvenience to himself; it was oppression to issue so many, and ought to be discountenanced by the court. 6 Term 639. 2 Saunders, 117. But the order of the County Court, directing a consolidation, was only interlocutory, and could not be appealed from. The words of the act "order, sentence and decree" from which an appeal may be made, necessarily signify a final order, sentence, or decree, otherwise every collateral or incidental order made in the course of a trial, may be brought to this court, which would lead to endless delay.

Henry, contra. It does not appear from the record that these warrants are for the same causes of action; neither the law nor practice requires declarations to be filed. The contracts are for different sums, and different defences may be made, as gaming, usury, &c. 9 John. 262. 1 Comis 114. The record does not show that the defendant was held to bail, which was the ground of decision in the case cited. Had the plaintiff warranted as it is desired, the defendant might have stayed execution under the act of 1784, for six months instead of twenty days; and to have brought these warrants is less oppressive than to have sued in the Superior Court, which he might have done under the act of 1809, on each due bill. As to the competency of the appeal, the order of the County Court was in its nature final, for the existence of all the warrants was merged into two—they were judicially annihilated, and no further steps could be taken in them.

Taylor, C. J. The Legislature have thought proper to attempt the suppression of the practice of issuing due bills, as one extremely mischievous to the community; and one method they have adopted is, to make the person liable to an action, who issues a due bill for a less sum than ten shillings. It would materially weaken the effect of this law, and disarm it of its sting, if when such separate actions are

brought, the court should interpose a consolidation rule. Such interference would be peculiarly improper in the present case, in which the plaintiff, by warranting and blending four dollars in each warrant, has pursued a much less rigorous course than he was allowed by law to do. This consideration, together with the stay of execution which the defendant might have availed himself of, had a larger sum been claimed in one warrant, induce us to concur in the opinion given by the Judge who heard the motion. His judgment on the motion is therefore affirmed.

NOTE.—See *Person* v *State Bank*, 4 Hawks 294.

BOLING *vs.* LUTHER—Page 202.

It is not actionable to say of a person that he swore to a lie "in obtaining a warrant from a justice respecting a deer;" where it appeared that the justice had no jurisdiction of the offence, and therefore perjury could not be committed in it.

This was an action of slander for saying of the plaintiff that he had sworn to a lie in obtaining a warrant from a justice, respecting a deer. The warrant stated that the plaintiff had made oath that he had reason to believe, that the defendant and another person, did take from his dogs, a large buck that he had wounded on the same day, that he found the buck in the defendant's possession the next day and demanded the carcase, but his wife refused to give it up. It then directs the officer to take the body of Luther to be dealt with as the law directs. The justices who tried the warrant dismissed it on the ground that no tresspass was proved.

The jury found a verdict for the plaintiff subject to the opinion of the court whether the words are actionable.

Norwood, for the defendant, contended that such words are not actionable without shewing that they were spoken

with reference to some judicial proceeding in which the plaintiff had been sworn; and in which he might have committed perjury. 6 Term 691. Here the magistrate had no jurisdiction of the case, and no oath taken by the plaintiff could have been followed by any prosecution.

RUFFIN, J. This is an action for slanderous words, in which a verdict was rendered for the plaintiff, subject to the opinion of the court, upon the point, whether the words are actionable or not? The words are, that "*plaintiff had sworn to a lie in obtaining a warrant from M. Harvey, Esq. respecting a deer.*" And the warrant alluded to by the defendant, is set forth in the case. Many decisions show, that there is a difference between a charge of *perjury*, and that of being *forsworn*. The latter imputation is not, of itself, sufficient to support the action; because it does not necessarily imply that the oath was taken before a competent authority in a judicial proceeding;—without which circumstances, no *perjury*, technically speaking, can be committed. And nothing short of "words containing an express imputation of some *crime liable to punishment*, some capital offence or other infamous crime or misdemeanor," will lay the foundation of an action for slander. 3 Wils. Rep. 186. *Onslow* v. *Horne*. But if the charge of being *forsworn* is made in reference to some judicial proceeding,—as to say, that one has sworn to a lie or forsworn himself *in such a suit*,—then an action may be sustained. But that will depend, again, upon the circumstance of the *suit* in which the oath is alleged to have been taken; being or not being one in which the plaintiff *might*, by swearing falsely, commit perjury. For, by reference to the suit, that is made part of the charge, and the whole is to be taken together. And if it appear that the plaintiff *could not* commit perjury, then there is no slander. It is like the common case stated in the books, where one says of another, that "he is a thief and *stole my growing timber*." Because no larceny could be committed of growing timber, the words are not actionable. If, in the case before us, the justice of the peace clearly had no jurisdiction of the case and there was *no offence* charged against the de-

fendants in the warrant, the plaintiff, then a witness, could not be guilty of perjury. By no force of construction can the charges contained in that warrant amount to any *crime*. I do not speak of the *form* of the precept, but allow the utmost latitude as to the *facts*. Suppose one was to obtain, on oath, a warrant against another, for—that he rode peaceably along the public highway on his own business—and the oath should be false, that would not be *perjury*, because there is no crime charged and nothing to try; and the oath of the witness, true or false, could operate nothing; because, admit the whole, still the defendant must be acquitted. So it is here. The oath was both *immaterial* and *coram non judice*.

Wherefore, there must be a nonsuit.

TAYLOR C. J. SEAWELL, J. DANIEL, J. and LOWRIE, J. concurred. HALL, J. dissented.

NOTE.—See *Brown* v *Dula*, 3 Murph. Rep. 574.

MUSE, EX'R OF RAMSAY *vs.* SAWYER, ADM'R DE BONIS NON OF HORNIBLOW—Page 204.

Where the same person is administrator or executor of both the creditor and the debtor, and has assets of the debtor in his hands sufficient to discharge the debt, the debt is extinguished.

The jury find a verdict for the defendant subject to the opinion of the Supreme Court upon the questions arising out of the following case. The defendant's intestates, Horniblow, of the town of Edenton, in his lifetime, by his writing obligatory, bearing date the 15th day of June, in the year 1798, bound himself to the plaintiff's testator, his heirs, &c. in the penal sum of six hundred and eighteen pounds eight shillings and six pence, to be discharged on the payment of three hundred and nine pounds, four shillings and four pence. The

said Ramsay died on or about the 9th day of September, in the year 1799, (the said obligation nor any part thereof being paid) having first made his last will and testament and therein appointed Alexander Millen, of the town of Edenton, and the said plaintiff William T. Muse of the County of Pasquotank, executors thereof, who proved the same and took upon themselves the execution thereof. That the said Millen, during his lifetime, transacted all the business relative to the estate of the said testator in the county of Chowan. That on or about the 15th day of October, in the year 1799, the said obligation and every part thereof being still due and unpaid, that the said Horniblow died intestate, and joint administration on his estate was by the County Court of Chowan committed to Jacob Blount of the same town of Edenton, and the said Millen. That before the said obligation or any part thereof was paid, the said Blount died, whereby the entire administration of the effects of the said Horniblow survived to the said Millen, who holding in his hands the said writing obligatory as one of the executors of the said Ramsay, and being also as administrator on the estate of the said Horniblow, on the receipt of the assets arising from his estate on the 30th June 1802, applied the sum of eighty-two pounds, thirteen shillings—in part discharge of the said writing obligatory, and on the 30th January, 1803, a further sum of seventy pounds, ten shillings, which said appropriations were endorsed upon the said writing obligatory in the proper hand writing of the said Millen, leaving a balance, including interest, of £192 14 4, of the assets of his said intestate, Horniblow, which remained in the hands of the said Millen, unappropriated, until his death, there being no other debt then due from the estate of his intestate: That the said Millen died on or about the 27th April, in the year 1807, having first made his last will and testament, and thereof appointed Josiah Collins, John Little, and Henry King, of the same town of Edenton, executors, who proved the same in due form of law, and took upon themselves the execution thereof: That administration *de bonis non* &c. on the estate of the said Horniblow, was in due form of law

committed by the County Court of Chowan to the said defendant, Sawyer, of the Term of March, in the year 1808; That the said John Little, Josiah Collins, and Henry King, having undertaken to transact the business of the said Millen, in the said town of Edenton, as well the writing obligatory as the monies of the estate of the said Horniblow, come into their hands, who delivered over to the said defendant, Sawyer, the said last mentioned sum of £192-14 4, and to the said plaintiff, Muse, the said writing obligatory on which the aforesaid balance of £240, appears to be due on the said 39 January, 1803, with interest from that time. There was also in the hands of the said Millen specific personal property of his intestate. To recover this balance of £240, with interest thereon from the 30th January, 1803, this suit is brought, and the following points submitted, viz.

1. Whether the said Alexander Millen, having held the said writing obligatory for such a length of time, and having at the same time the estate of the said John, more than sufficient to satisfy the said bond, is such a presumption of payment thereof, as to bar the plaintiff's recovery or operate as an extinction of the debt?

2. Does the act of 1715, under all the circumstances of the case, operate as a bar to the plaintiff's recovery?

Gaston, for the plaintiff.

If a creditor appoint the debtor his executor, it shall operate as an extinguishment of the debt; but the debt must be due from the detor in his private capacity, and not as executor or administrator. A suspension of a remedy by operation of law, is different from one created by the voluntary act of the party. If administration is granted to a debtor, the debt is not thereby extinguished, because he comes in by operation of law. If the creditor make the executrix of the debtor his executrix and die, this is no extinguishment of the debt; because the executrix is not entitled in her own right. Co. Lit. 264, b note 1. 3 Bac. Ab ex & Ad. A 10. Cr. Car. 372.

Browne, for the defendant.

The debt is extinguished, because the same hand that is

to receive ought to pay. Here Millen, as executor of Ramsay, had a right to receive the amount due on the bond; and having had assets as administrator of the debtor, he ought to pay. This is the principle which prevailed in the case of *Dorchester* v *Webb;* Cro. Car. 370; for although judgment was there given for the plaintiff, it was because when she was made executrix of Anne Rowe, she had fully administered all the assets in her hands, as executrix of her husband, Dorchester, one of the joint and several obligors. So that, though she was the person having a right to receive, she was not the person who ought to pay.

RUFFIN, J. The case is, that Horniblow, in his lifetime, became indebted to Ramsay by bond, bearing date the 15th June, 1798. Ramsay died 9th Setember, 1799, before any payment made on the bond, having made his last will and testament, whereof he appointed Alexander Millen and the present plaintiff the executors, who proved the same. Horniblow died 15th October, 1799, intestate, and administration of his estate was granted to the same Millen and one Blount jointly: That Blount soon after died, and before any part of the bond was paid, and said Millen survived and received assets from Horniblow. In June, 1802, he applied £82 13, and in January, 1803, £70 10, in part discharge of said bond, and endorsed the said sums thereon as credits: That Millen died in 1807, having in his hands, in money, besides other specific personal property, £192 14 4 of the assets of Horniblow, which were sufficient to discharge the balance due on said bond and also the said obligation: That there was no other debt owing by his intestate: That said Millen made a will and appointed executors, who proved the same and delivered to the plaintiff the said bond, and paid to the defendant who had obtained letters of administration *de bonis non* of the estate of Horniblow the said sum of £192 14 4, and delivered to him the other effects of Horniblow.

The jury found a verdict for the Defendant, subject to the opinion of the court upon such questions as arise out of the foregoing case. And it is contended, for the defendant, 1. That by reason of the suspension of the action growing

out of the fact, that Millen was executor of the creditor and administrator of the debtor, there is an extinguishment o the debt; and if not, then, 2dly, that the debt is discharged by reason of assets of Horniblow. It is true, that a suspension of personal duties by a man's own act, will work an entire extinguishment. But the rule is strictly confined to the act of the party to whom the duty belongs really and beneficially. Plow. 36. It would be exceedingly unreasonable if it were otherwise. Accordingly, if a creditor appoint his debtor his executor, the debt is gone, even without proving the will. But if the ordinary appoint the debtor administrator, the debt is not extinguished.

The diversity here appears. In the former case, it is the act of the testator; in the latter it is the act of the law. Needham's case, 8 Co. Rep. 136. And so, again, the law will not suffer one who is acting in *auter droit* to prejudice the principal by a suspension of the means of enforcing a duty. Thus, if a feme executrix of the creditor marry the debtor, the debt survives upon the death of the husband, against his executors. Cr. Eliz. 114. And, by parity of reasoning, I suppose, upon the death of the feme, the action can be brought by her surviving co-executor, against the surviving husband.

The reason given by Lord *Coke* for this last case is, that if the marriage produced an extinguishment, then there would be a *devastavit*, which the law will not imply, because it is a wrong. So again, if the debtor make the obligee's executor his executor, upon the death of him who is executor of both, the action survives. 1 Salk. 305. And if the debt is not extinguished, where the obligor makes the obligee's executor his executor, it will surely survive when the creditor's executor takes administration of the debtor's estate. 8 C. Rep. 136. I should, therefore, think that the action might be well supported, if there was nothing more in the case. But upon the secondquestion, I am of opinion with the defendants, upon the ground that sufficient assets of Horniblow's estate came to the hands of Millen to discharge the

debt, and that it was entitled to have them applied in due course of administration. It is not necessary that Millen should have actually, by endorsemet on the bond or other similar act, have applied Horniblow's assets in discharge of this debt, in order to its extinguishment. As soon as the assets came to his hands, the law made the application of them, and the debt became extinct *instanter*.

In Darcy's case, Plowd. the court mentions a case where an obligee, who was executor of the debtor, sued the heir on the obligation. The defendant pleaded, that the plaintiff administered goods to the value of the debt and retained the same sum towards paying himself. The court said, that, whether he retained or not, was immaterial, as he might have done it, and it was his own folly not to do so. The defendant consequently took issue, that he had administered the goods, not upon the retainer. The reason of that is, that the creditor has full satisfaction of his debt by alteration of the property of the assets. And it is upon this ground, that the whole doctrine of retainers, so beneficial to executors, is founded. As soon as assets came to his hands, a satisfaction of his debt is effected, and the property of the goods is changed and vested in him, as his own proper goods, by operation of law. If that was not so, they would be assets still, and so, liable to suing creditors; which is not the case. And being a creditor in a representative capacity, makes no difference. *Dorchester* v *Webb*, Cro Car. 373. There the plaintiff, as executrix of the obligee, sued the defendant, as one of two joint and several obligors. *Plea*—that the plaintiff was also executrix of the other obligor. *Replication*—that the plaintiff had fully administered all the assets of the deceased obligor, before the creditor made her executrix, and that, at the time of the death of the creditor, nor at any time since, had any goods of her first testator come to her hands. On demurrer, the replication held good. But the court said, that if there had been assets, the debt would have been extinct. Which shews, that where the same person is executor of the creditor and debtor both, he may retain of the assets of the debtor's estate in satisfaction of his debt as executor of the creditor; and that, as he may, he shall do so.

It may be observed, that in the above case, the debtor's was afterwards made the creditor's executor, and is the converse of the present case. That does not alter it. For the reason of the whole is, that the same person that is to pay, is to receive. But an executor is only liable to pay, by reason of having assets. If he hath assets, he is the person to pay, in both instances, whether the obligation to pay, precede the right to receive, or vice versa; and if he hath no assets, he is not to pay in any case. It is therefore, totally immaterial whether he be executor of the debtor before or after his being executor of the creditor. And in Lord *Holt's* first position, *Wankford* v *Wankford*, 1 Salk. 305, he puts the case of the executors of the obligee, (as here) being made executors, (here administrators) to the obligor; and, having assets, the debt is extinct, and the executor cannot sue another obligor in the bond; *for having assets, amounts to payment.* As to the circumstance of part of the assets being specific chattels, that does not alter the case. There is but one exception to the right of the executor to retain so much of the testator's as will satisfy his debt, and that is of lands appointed to be sold by him as executor. Nay's Man c, 47. p. 120. But if that was not the case, he might sell the goods to the value of the debt; and as he might have done it, it is his own fault that he did not. Besides, in all the cases, there is no distinction taken as to the kind of assets, which being in the hands of the executor will work an extinguishment; but it is said of assets generally:—and in these old case, the Judges are very scrupulous about laying down general propositions, unless the rules are of general operation.

Wherefore, I am for judgment for the defendant.

The other Judges concurred.

NOTE—See *Dozier* v *Sanderlin*, 1 Dev. & Bat. Rep. 246. See also, *Carroll* v *Durham*, 1 Iredell's Rep. 36.

STEPHEN KING'S ADM'R *vs.* HILL—Page 211.

Where the jury decide against the weight of evidence, in a case where no flagrant breach of duty is committed by the person in whose favour they find; where also there may reasonably exist a difference of opinion; and where it is certain that justice has been done, the court will not grant a new trial, upon the bare probability that the contract is usurious.

This was an action of trover, brought by the plaintiff, to recover the three negroes mentioned in a bill of sale from defendant to plaintiff's intestate, which is drawn in the usual form; to which plaintiff, T. D. King, was a subscribing witness, and on which, there was the following endorsement: "The condition of the within bill of sale is such, that if the said Hill, within nine months from the date thereof, pay over to the said S. King the purchase money therein named, then to be void and of no effect, otherwise the said King to have full power and authority to sell the property at public auction, first giving ten days notice thereof, and make himself whole."

The statute of Usury was pleaded, and the weight of evidence in support of the plea was clearly in favour of the defendant. The jury, however, found a verdict for the plaintiff, and valued the negroes sued for to $1150.

When the bill of sale was read by the plaintiff, the defendant offered, as evidence, the endorsement made upon it. This was objected to by the plaintiff. The court permitted it to be read. A motion was made for a new trial; which is referred to the Supreme Court. It is also referred to them, whether, in case there be a new trial, the deed shall be read as evidence? They are both in the handwriting of the subscribing witness, now the plaintiff.

SEAWELL, J. This being a case where the jury decided against the *weight* of evidence, not of a *flagrant* violation of duty, but where there may, reasonably, be a difference of opinion amongst honest men; and it being quite cer-

tain that they have done justice, this court feels it unsafe to interpose, upon the bare probability that the contract was usurious.

HALL. J. LOWRIE, J. and DANIEL, J. concurred. RUFFIN, J. dissented.

January Term, 1817.

WILLIAM JONES AND OTHERS *vs.* ZOLLICOFFER—Page 212.*

A Court of Equity will not compel a purchaser for a valuable consideration, without notice to part with any legal advantage he has over his adversary, although he may have obtained it accidentally or improperly; nor will it compel him to discover his title, or title deeds or boundaries, nor to surrender title deeds, nor suffer testimony to be perpetuated against him; because a Court of Law would do none of these things. But where nothing is asked of him but what a Court of Law would compel him to perform, Equity affords him no protection, and does not allow him to withhold the property of another.

When a bill is filed by one, who has the legal title, but under such circumstances that he cannot be completely redressed at law, it is no defence for the purchaser to plead that he purchased for a valuable consideration without notice. Such plea will only protect the honest purchaser after he has got the legal title.

It is the province of a jury in an equity suit to try only such disputed *facts*, as the parties by the bill and answer, submit to them; but to find that a sale is justifiable is a *conclusion of law*, not submitted to them.

If a legatee in a will is also executrix, and elect to take as legatee, her power as executrix over the property bequeathed thenceforward ceases: her assent operates for the benefit of the ulterior remaindermen, and converts their equitable into a legal estate.

A younger equity can in no case prevail over an older one, but where it has also the law; for the rule is, that where there is equity on both sides, the law shall prevail.

*The original papers in this cause, having been by some accident mislaid, did not come into the hands of the Reporter until within a few days past. To extract from a voluminous mass of chancery forms the material parts of the cause, and to mould them into a shape fit for publication has been a work of much labour; but one, upon which more might have been properly bestowed had time permitted. The aim has been to seize the mean between obscure brevity and needless prolixity.

The complainants claiming as legatees and next of kin to William Jones, instituted a suit in equity against Zollicoffer, in which the bill stated that William Jones died in 1758, having first made his will, which, amongst others, contained the following clause. "I give to my wife Sarah Jones the use of a negro fellow named Ben, another named Sam, and three wenches named Sal, Nan, Doll, as also my stock of goods, chattels, &c. and parts and parcels of my estate during her life, then to be equally divided among my children, by my executors." He appointed his wife and his son William his executors.

That part of the negroes so bequeathed, are in the possession of Zollicoffer, who pretends a title to them under a purchase, made either by himself or his father from Sarah, the widow, who alone, took upon herself the burthen of executrix, and who, before the period of such purchase, had paid all the debts due from the testator's estate, and had elected to hold the negroes as legatee, and had actually so held them for many years.

The said Zollicoffer was acquainted with all the circumstances, and purchased from the widow as legatee only; and paid a consideration proportionate only to her life estate, and applied the money paid, or knew of its application, to the discharge of the widow's proper debts. The bill then prays a discovery of the names and increase of the negroes, and of the profits received from their labor, and a decree for the respective shares of the complainants.

The answer of Zollicoffer admits the purchase of a negro named Beck from the widow and three of the legatees, who assured him that they could then, or would make a good title to her; that he has understood that the girl was sold to pay a debt contracted for the support of the family.

April Term, 1798. To this answer a replication was filed, and the court directed five issues to be made up; the only one of which necessary to be here stated was as follows: "Whether the sale to Zollicoffer was for the purpose of paying the debts and expenses of the testator's estate, or the necessary expenses towards maintaining the children, or young

negroes belonging to the testator, or for the benefit of the widow only? And whether the said Zollicoffer had notice of the equitable claim set forth in the bill, when he purchased?"

October Term, 1800. On this issue the jury found that the sale of the nego Beck was justifiable, and for a valuable consideration, and that the defendant purchased without notice.

JOHNSTON, J. The court then decreed that the complainants should pay to Zollicoffer his costs.

October Term, 1805. The complainants afterwards filed a bill of review, in which they made the following assignment of errors, viz.

1. No such issue as that above stated ought to have been submitted to the jury, it being perfectly immaterial as to the claim of the complainants, whether the said negro Beck was sold by the widow who held her as a legatee for life for any of the purposes mentioned in the said issue or not.

2. Such issue ought not to have embraced any other causes for the sale than that expressed in the answer, viz. "to pay a debt contracted for the support of the family," which could not, were it true, enable the widow, a legatee for life only, to sell the said negro absolutely and for ever, and so as to divest the property of the complainants.

3. The jury have not specified the cause or purpose for which the said sale was made, nor have they said it was for any of the purposes contained in the said issue.

4. That the court should have pronounced a decree for the complainants against the said Zollicoffer for all the descendants of Beck, which were, or had been in his possession, or in other words for the complainant's shares of all the said negroes.

October Term, 1811. To this bill of review Zollicoffer demurred, and upon argument the following opinion of the court was pronounced by

HENDERSON, J. It is a maxim in equity that where equity is equal the law shall prevail. Under a mistaken application of this principle the original bill was dismissed as to

the defendant Zollicoffer. To reverse that decree is the object of the present bill.

A purchaser for a valuable consideration without notice, has an equity equal to that of any one; and if he has any advantage at law over his adversary, a Court of Equity will not deprive him of it; although he may have obtained it accidentally, or even improperly. It will not compel him to discover his title, or his title deeds, the boundaries of his lands, to surrender up title deeds, although improperly obtained; or suffer testimony to be perpetuated against him, because a Court of Law would do none of these things. But when he is not called on to surrender any of these advantages; when nothing is asked of him but what a Court of Law would compel him to perform, it affords him no protection; and when he withholds from another his property, he shall be compelled to restore it—the court taking care that he shall not be deprived of any of his legal advantages. The case of *Collet* v *De Gols & Ward*, Cases Temp. Talbot 65, so much relied on by the defendant's counsel fully supports this opinion. A similar plea to the present protected Ward and his trusteee, as to all the estates of the bankrupt, which the bankrupt had mortgaged prior to the bankruptcy, and which by assignment had come to Ward or to his trustee before the commission was sued out; for as to them Ward had a legal advantage; he had the legal estate, and nothing but equities of redemption remained in the bankrupt at the time of his bankruptcy to forfeit by the act of bankruptcy for the benefit of his creditors; and when the assignee came into a Court of Equity to redeem the mortgaged estates, Ward's equity being equal to his, and he having the estate at law, it was decreed that the assignee should redeem, upon paying not only the money for which the estates were originally mortgaged, but also the money paid by Ward to the bankrupt for a release of the equities of redemption; although the equities were purchased after the act of bankruptcy committed, and when the bankrupt had nothing which he could sell. For Ward had the legal estate, an equity of redemption is un-

known at law, and cannot be enforced in the Courts of Law. And but for the interposition of a Court of Equity, the mortgaged estate, after default in the mortgagor, would remain forever in the mortgagee. Ward's equity therefore protected him in a Court of Equity, as he would have been protected in a Court of Law; and the truth of his plea was ordered to be ascertained.

But as to that property derived immediately from the bankrupt after his bankruptcy, and before commission sued out, the court directed Ward to account, regardless of the truth or falsity of his plea; for as to that he had no legal advantage.

It is deemed unnecessary to examine farther the cases cited in the argument, or to notice some expressions of the Chancellors; such as that a Court of Equity has no jurisdiction against a purchaser for a valuable consideration without notice, and others of like import; for in all the cases the complainants were endeavoring to obtain something which the law would not grant, and the expressions of the Chancellor's were used in reference to such cases; and if not, were *extra* judicial. It is unnecessary to decide whether the allegations of the parties warranted the making up of the fifth issue, to wit: Whether the defendant was a purchaser for a valuable consideration without notice. But it is very questionable whether the defendant had made in his plea or answer (call it which you will) any such allegation.

It is also objected that there has not been a final decree, passed and enrolled in this cause. It is true those formalities which are used in England have not been complied with. But there is sufficient for this court to perceive that there was a decree pronounced in favor of Zollicoffer. The issue was made up under the direction of the court; it was found in Zollicoffer's favor; it was ordered that the complainants should pay him his costs: an interlocutory order was made as to the other defendants, and the cause progressed as to them; and rested as to him. According to the loose manner in which the decrees of the courts are taken, we must, in justice to the parties, consider this as sufficient evidence

of a decree having been pronounced. It is therefore ordered and decreed that the decree dismissing the bill as to Zollicoffer be reversed.

Upon the reversal of the original decree, Zollicoffer filed a petition for re-hearing, which was argued by

Browne, for the petitioner.

In this case the widow who conveyed to the defendant, was executrix of the estate and legatee for life of the property so conveyed. It is stated, in the original bill, that before coveying to the defendant she had elected to hold as legatee; but that fact was not admitted in the answer; nor was any issue made up upon it; nor any proof whatever offered of it. The jury, on the proper issue, have found that "the defendat purchased for a valuable consideration, without notice of the complainant's claim."

On behalf of the defendant it is contended, that the original bill was properly dismissed, and of course that the demurrer to the bill of review ought to be allowed.

I. Because the complainant in the original bill did not prove that the widow had elected to hold as legatee.

According to the practice in the Court of Chancery in England, the Chancellor finds what material facts in issue are proved by the parties; and they are all set forth in his decree as having been proved; and the facts not stated in the decree to have been proved, will, on a bill of review, be held not to have been proved. 2 Ch. Ca. 161-2. 1 Vern. 214.

Here the Legislature has enacted, that all the facts in controversy between the parties, shall be tried by a jury: and, therefore, the only proof which the court could have admitted in support of this allegation in the bill, would have been the admission of the defendant; for then it would not have been a disputed fact; or the verdict of a jury, it being a disputed fact. But the complainants produced neither of these, nor any other proof whatever: therefore this allegation not being proved or admitted, must be taken not to be true, *(de non apparentibus et de non existentibus eadem est ratio.)*

If a devise be to an executor himself, he shall take as executor, till his election to have as legatee. Com. Dig. Adm. C. 5, & mult. Als. As the widow had not made her election to hold as legatee, she held as executrix, and in that character sold, and surely conveyed a good title, both in law and equity, and therefore the original bill was properly dismissed, and the demurrer must be allowed on this ground.

If it is contended that the court may reverse the decree and open the cause so as to let the complainants have an issue made up on this allegation, because it would be hard that the party should suffer from the mistake or oversight of his counsel; it may be answered,

1st. There is not a single tittle of testimony, not even the oath of the party, to shew that there was any mistake or oversight whatever, or that the merits were not fairly and fully brought forward and disclosed on both sides. And if a decree can be reversed, merely because a man of lively imagination can fancy that, the party against whom it is made, might possibly have been able to produce testimony, which might have had an influence on that decree, all decrees whatever may be reversed.

2ndly. "It is to be lamented, if the fact be so—but it is out of the power of this court, without introducing a rule pregnant with inconvenience, to remedy it," was the answer given by this Court, unanimously, to an application for a new trial, where the mistake of counsel and surprise on the party were sworn to. *Lester* v *Zachary*, 1 Law Rep. 380. And surely nothing could be more inconvenient than permitting a party first to bring his cause to hearing on one set of facts, and when the opinion of the court was found to be against him on them, to try another: and perhaps another, at the distance of many years (as in this case) when his adversary has probably lost much of his testimony. The complainants may have abstained from making up this issue until the defendant's witnesses have died. The defendant did not want an issue on the complainant's allegation:—his case was as strong without such issue, as if one had been made up, and found for him. Such practice is not permitted

in England, even where the court has no doubt that the party applying for a new trial has merits. 1 Ves. jr. 133. The maxim is "it is better to suffer a mischief than an inconvenience."

3dly. At law, if the plaintiff has had a verdict against him, and had any material testimony, which he could not offer to the jury, he may obtain a new trial, provided he shews that his not offering that testimony was owing to any fraud in his adversary, or surprise, in a doubtful case, on himself. But, if he does not move for a new trial, but suffers judgment to be entered up on the verdict, then in that case he is without remedy; for that judgment can only be reversed by writ of error,—for error on the face of the record; or for some fact, (such as the death of one of the parties) shewing that the judgment was a nullity. Now in the present case the complainants suffered a decree to be entered against them, and acquiesced in it for many years, and now bring a bill of review to reverse that decree. A bill of review is in nature of a writ of error, and "can only be brought upon error in law appearing in the body of the decree itself (or issues,) or upon discovery of *new* matter. Mit. 78. Com. Dig. Chan. G. and mult. ats.

It is therfore concluded that on this ground the demurrer must be sustained unless it is contended that this court is neither bound by precedent or principle, but can say with the tyrant of old, "*Sic volo, sic jubeo.*"

II. If it had been proved that the widow had made her election to hold as legatee, it is admitted that that election would have vested the legal remainder in those under whom the complainants claim, and that the widow, after such election, could only dispose of the legal estate for her life to the defendant. But at the time that the defendant purchased of the widow, he believed that she was conveying to him a good estate in fee simple, gave an adequate and valuable consideration for such an estate, and had no notice of the complainant's claim—so the jury has found. And, the defendant being in possession, it is contended that this court ought

not to interfere to deprive him of that possession, or in any manner to invalidate or endanger his title.

The maxim in equity on which this position is grounded is sometimes cited as being "where there is equal equity the law must prevail." But this is not the true maxim, but a consequence of it. The true maxim is, "*In æquali jure, potior est conditio possidentis.*" The person having the legal title can and does generally recover possession at law, and whoever wants to deprive him of that possession must come in as a complainant in equity, and if the defendant who has got possession has equal equity with him who demands it from him, the court will not interfere between them; for there is no equity or justice in taking a burthen off the back of one innocent man and imposing it on that of another equally innocent man. So that the legal title prevails in such cases, not because equity pays any more respect to it but because it puts its owner in possession, through the instrumentality of a Court of Law.

For example, A, B and C, have several mortgages on the same property for £1000, each without being affected by no tice of one another's mortgages. A has the legal title, being first mortgagee, but this court will compel him to convey it it to B, on B paying him his £1000: But if A, before B files his bill, conveys or assigns the legal title to C, on C paying him his money, then B cannot compel C to part with the legal title without paying him £2000. What is the reason of this—the legal title is equally valid in both cases, and equally operative; for it puts its owner in possession; and B's equity is still the same; for he hath done nothing to strengthen or impair it. The true reason is, that when A had the legal title, by means of it, he got possession, and by virtue of his mortgage was a purchaser for a valuable consideration to the amount of £1000, and so far *in æquali jure* with B, and as long as he sustained that character, the court would not interfere against him; therefore B when he wanted to procure the interference of the court in his favour was obliged to deprive him, not of his legal title, but of his equal equity, which he did by paying to him or tendering

the £1000. Upon that A ceased to be a purchaser for a valuable consideration, and B continuing to be so, the court readily interferred in his favour, against A's legal title. But when A conveyed the legal title to C, C became a fair purchaser to the amount of the £1000 he paid to A, and continued a fair purchaser to the amount of his original mortgage, viz £1000, and having got the possession by virtue of his legal title, the court would not interfere against him until B deprived him of the character of a purchaser by paying him the whole £2000—as well his own younger mortgage as A's elder one. So if there had been an outstanding satisfied term in D, although D, not being in equity a purchaser, would have been compelled to convey to a purchaser without receiving any consideration, and these morgagees would have been entitled to call upon him according to seniority (for between equities, neither of whom can hold the possession for want of the legal title, *qui prior est tempore, potior est jure*) yet if D assigned this satisfied term, which itself was of no value in the eye of equity, to C, he would by means of it get the possession and compel the others to resort to equity if they wished to get it from him, and in order to induce the court to act against him they must deprive him of his character of a purchaser by paying him off.

This principle more extensively influences the conduct of courts of equity than any other principle whatever. In equity there are three classes of persons. 1. Purchasers, or those who claim for a valuable consideration. 2. Widows and children, or those whose claim is considered meritorious. 3. Volunteers, or those who claim without any consideration. And equity will relieve purchasers against widows and children or volunteers, and it will relieve widows and children against volunteers; but it will not interfere between volunteers, 2 Ch. Ca. 133—4, 3 Br. Ch. 13. 170; nor between widows and children; nor between purchasers, which is the point to be more particularly proved.

A purchaser having the legal estate can, it is believed, come into equity only for one of three purposes. 1. To perpetuate testimony. 2. To obtain discovery. 3. To obtain more complete relief.

The court will perpetuate testimony where it will neither grant a discovery nor give relief. Mit. 130 1. 1 P. W. 118. 1 Atk. 450.

So it will more readily entertain a bill for discovery than one for relief. Mit. 163.

The original bill prayed both discovery and relief. But it was properly dismissed as to both; for it is a well settled rule that against a fair purchaser for a valuable consideration, without notice, the court will take no step whatever. Mit. 162, 215. 1 Eq. Ca. Abr. Notice C. Co. Lit 292. 6 note.

Against a purchaser for a valuable consideration without notice, the court will not entertan a bill for the purpose of perpetuating testimony. 2 Vern. 159. 2 Ves. jr. 458. Or for a discovery, and still less for relief. Prec. in Ch. 51. 1 Ca. Ch. 68. 2 Ca. Ch. 47, 8. Ib. 72, 3. 1 Vern. 27. 2 Vern. 158. 2 Ves. 450. 1 Br. Ch. 578. 2 Br. Ch. 66. 2 Ves. jr. 451.

In some of these cases a discovery was sought of deeds the defendant had got into his hands by a trick or a fraud, but was refused. 1 Ch. Ca. 68. 1 Vern. 159. 2 Ves. jr. 458. And in almost all of them the complainants had the legal title; so that when it is asserted that the plea of being "a purchaser for a valuable consideration, without notice," is no defence in equity when the complainants own the legal title, all that can be said in answer is, that such an assertion is worthy of admiration.

The case reported in C. T. T. 65, under the title of *Collet* v *De Gols and Ward* has been supposed to be contrary to the doctrine now attempted to be supported by the defendant. But a very little consideration will show that it strongly supports the defendant.

The complainant as assignee under a commission of bankruptcy against Tyssen, filed his bill to set aside several conveyances which Ward and the other defendant, in trust for him, had obtained from Tyssen after his bankruptcy, and without consideration. Although Bradly is not mentioned as a defendant in the title of the bill, yet he certainly was one; for a decree was made against him. The property of

the bankrupt was placed in three situations distinctly different. 1st. The mortgage to Bradly, which he never had assigned, but of which the bankrupt had assigned the equity of redemption to Ward, without receiving any consideration thereof. 2d. Morgages before the bankruptcy, made to Haskshaw and others, and by them assigned to Ward and others in trust for Ward. 3d. Property conveyed to Ward and others in trust for him after the bankruptcy. As to Bradly's mortgage, he had the legal estate which gave him the possession or right of possession, and was a purchaser for a valuable consideration, without notice, to the amount of his mortgage, which was of course paid to him in order to divest him of the character of a purchaser, and then he, Bradly, was decreed to convey to the complainant; for the assignment to Ward of the equity of redemption was after it had been vested in the complainant, and was fraudulent, and unsupported by the actual possession, or right of possession —as to it, no decree was made against Ward, nor any step whatever taken against him. When Bradly was paid, the equity of redemption was necessarily to be disposed of by the court, and the court did dispose of it by decreeing Bradly to assign to the elder and fairer equitable claimant.

As to the property of which Ward had the legal title, and by means of it the possession, or right of possession, and concerning which the decree must necessarily be against Ward, Lord *Talbot* after distinctly stating, "that a purchaser for a valuable consideration, without notice, having as good title to equity as any other person, this court will never take any advantage from him; and consequently, will not grant a discovery against him, &c." directed an issue to try whether Ward had notice of the bankruptcy, and when. He also made the same order as to the third class of property, considering Ward, and his special trustee, as one person.

The case of *Strode* v *Blackburne*, 3 Ves. jr. 222, hath also been relied upon for the complainant. There a bill was filed for a discovery and relief, to which the defendant pleaded that he was a purchaser for a valuable consideation, without notice, &c. Lord *Rosslyn* overruled the plea as to the

discovery, and directed that it should stand for an anwer, with liberty to except. So far, this case is inconsistent with what is now contended for on behalf of the defendant, and is inconsistent with the doctrine of Lord *Rosslyn* himself, 2 Ves. jr. 458; and with every other case previously decided and reported. And in the subsequent case of *Wallwyn* v *Lee*, 9 Ves. jr. 24. Newl. on Cont. 515, which was exactly similar to *Strode* v *Blackburne*, Lord *Eldon* allowed a similar plea, and said, "that the decision of Lord *Rosslyn*, in *Strode* v *Blackburne*, was not consistent with the doctrine of equity as to a purchaser for a valuable consideration, without notice."

The legal title in equity is of no consideration; for "the trust is the land in equity, and the owner of the "land." 1 Bl. Rep. 162. And it is devisable by general words, as lands. 1 Eq. Ca. Abr. 174, 2 Vern. 679. And it will descend as lands. 2 P. W. 629.

It is therefore submitted, that on either of these grounds, the original bill was properly dismissed, and that the demurrer to the bill of review, ought to be allowed.

January Term, 1817. The opinion of the court was delivered by

Seawell, J. The complainants in the original bill, charge, that William Jones, being possessed of the original stock of the slaves in question, devised the use of them to his wife for life, and directed by his will, that after his wife's death, the slaves should be divided by his executors amongst all his children, and made the wife and his son William (one of the complainants) his executors: It further charges, that the wife died in 1793, and that the defendant has possession of the slaves under some purchase for a small price, and with full notice of the children's claim, and that the plaintiffs represent the children. The bill also charges, that the wife elected to hold as legatee, and that all the debts had been paid before the sale of the slaves, and prays that the slaves may be surrendered, and the defendant decreed to account for their profits.

The defendant, by his answer, in substance says, that he purchased from Sarah Jones (the widow) Brittiain Jones and Elizabeth, two of the children, and William Perry, who it seems married one of the daughters of the testator; that the vendors assured him they could or would make a good title, and that he did not pretend to be a judge of its goodness, but bought upon their assurance; that he understood the sale was made for the support of the family—that Elizabeth was at that time of full age.

Upon this bill and answer, a jury is called upon to try the truth of the matters in dispute between the parties; and these matters in dispute can only be found, by comparing the bill and answer, and not by any issues otherwise made up. And it may be here remarked, that every thing charged, which is not admitted by the answer, must first be found by a jury before the court can act upon it; for according to the constitution of our courts, the jury is to decide all matters of fact. The jury, in this case, found that the sale was "justifiable," and that defendant purchased without notice, and for a valuable consideration: Upon which, the complainant's bill was dismissed. Now it seems clear to us all, that it was the province of the jury to find only facts, or rather what the parties, by the bill and answer, submitted to them; that their finding the sale "justifiable," was a conclusion not submitted to them, either by the bill and answer, or indeed by the issues made up by the court: And we are free to declare, that if the wife *did elect* to take as legatee, as charged in the bill, her power thereafter as executrix ceased—her assent operating for the benefit of those in remainder; the legatees thereby acquiring a legal title to that, which before was an equitable interest. The effect, then, would be, that the wife could only legally, or equitably convey to the defendant, what she herself had, a life estate. And as to the effect of a purchase by an innocent man for a valuable consideration in such a case, we also hold that the rule in equity is clear; as between mere equitable claimants, or, in other words, those who only have equitable titles, that *qui prior est tempore potior est jure;* and that a younger equity, can in no case

prevail against an older, but where it has *also the law*; for the maxim then is, that there being equity on *both* sides, the law shall prevail. In a controversy between such parties, the legal title has been emphatically called the *Tabula naufragis*, upon which either might support himself. When it is said, that either may support himself by the legal title, it is meant, that equity will not *take away* a legal defence from such innocent purchaser. When an equitable owner of property calls upon the legal owner for the *title*, which has been called the shadow, a Court of Equity regards the *substance*, and will, in general, compel him to surrender it; for it would be contrary to the first principles of justice, that he who has only a *formal* paper title, should, without any merits, hold it and enjoy the benefit, against him who has honestly paid his money for it. But when a Court of Equity is called upon to take away that right, which the *law* would sustain, if this legal owner can himself shew equity, having the law and equity also, a Court of Equity will refuse its interposition, and, in such case, leave it to the law to decide.

Whenever, therefore, any innocent, honest purchaser, has *armed* himself with the *law*, though his equity might be postponed, a Court of Equity will not take away the *defence*; but if it amount not to a *defence* at law, the complainant in equity would be idly spending his money to obtain it. When a bill therefore is filed by one who has the legal title, but who comes into equity because he cannot be *completely* relieved at law, it is no defence for the defendant to plead that he is an innocent purchaser for a valuable consideration without notice—because the complainant is not seeking to *disarm* him at law, the defendant at best having but a *wooden* sword, incapable of protecting him against the assault of a legal claimant. This point was expressly determined by Lord *Thurlow*, in the case of *Williams* v *Lawler*, 3 Brown Rep. 264, where he says it does not apply against one seeking a *legal* claim, and is only a bar to an *equitable* title; and it is to no purpose to say, that the case turned upon the claim of a *widow*, for that is not noticed by

the Lord Chancellor. The counsel for the purchaser admitted, that in the case of two *equities*, want of notice could make no difference, for the oldest must prevail. Courts of Law afford a remedy where the plaintiff has a *title* to the thing in question, either by adequate damages, or the possession of the thing itself: Courts of Equity exercise no control over the property itself, but afford relief by acting on the person, wherever the complainant has a title and cannot completely assert it at law; or where he has no effectual title, but only a *right* to have one. The right to have a title, follows the property as an incident, so long as it continues to be owned by those who purchased with notice of this equitable claim, or by those who gave no valuable consideration for it; but when purchased, and the legal title *actually passed*, and for a valuable consideration *paid*, before notice, then the incident is not dismembered, and such purchaser will stand in the shoes of his vendor: And it is the same, if the conveyance was so defective, that the legal title did not pass; for in such cases, it remains as it would have done between two persons, both of whom had bargained for the same property, but neither had obtained the legal title, they would neither of them have more than *equities*, and the rule *qui prior est tempore*, must necessarily prevail. So if a person purchases a paper not negotiable, he obtains only an equitable title, and the consequence is, that the want of notice can make no difference. He is subject to all the equity of his vendor; and so the rule has always been, and does not arise from the form of action at law, for it was so held whilst Courts of Law respected equitable interests: But there are cases in which it is not necessary to apply to Courts of Law for assistance, as in the case of a bond to make title, which if assigned, the assignee in equity must do the same equity which the assignor ought to have done before he could obtain a title. From this reasoning, it seems to me conclusively to follow, that it is the *legal* rule which operates as the shield to the purchaser, and that Lord *Thurlow* was right in his application of the rule. And indeed the books are full of cases where a younger purchaser, for a val-

uable consideration, and without notice, has been permitted, after discovery of an older purchaser, to buy a prior incumbrance, and *thereby* protect himself. Now if the rule laid down in argument were true, that whenever an innocent purchaser, for valuable consideration, and without notice, was attempted to be disturbed, that such plea would of *itself* protect him—in other words, that the honesty of his purchase should defend him—it is remarkable, that in all the cases alluded to, the honest purchaser was only protected *after* he had got in the *legal title*. The books, indeed, when speaking of those cases, say, where equity is equal the law shall prevail, and that he who hath only an equitable title shall not prevail against *law* and equity. And they lay it down as established doctrine, that a *bona fide* purchaser, without any knowledge of the defect of his title, may lawfully buy in every judgment or incumbrance, and though nothing be due upon it, yet if he can defend himself *at law* with it, his adversary shall have no aid in equity to set them aside; for being *able* to defend himself at law, equity will not disarm him.

The decree of reversal is confirmed.

NOTE.—Upon the first and last points, see *Bell* v *Beeman*, 3 Murph. Rep. 273. *Henderson* v *Hoke*, 1 Dev. & Bat. Eq Rep. 119. Upon the point of the executor's assent to a legacy for life operating in favor of the remaindermen, see *Dunwoodie* v *Carrington*, 2 Car. L. Repos. 469, and the cases referred to in the note.

STATE *vs.* WALKER—Page 229.

If an indictment for forgery contains such a charge as amounts to that crime at common law, the judgment shall not be arrested, although the prisoner be indicted under the statute.

The prisoner was convicted of forgery under the act of 1801, C. 6, the words of which are "if any person or per-

sons of their own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge or make or shall cause or wittingly assent to be forged or made," &c.

The words of the indictment were "with force and arms in the county aforesaid, feloniously, wilfully and wittingly did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and wittingly aid and assist in the false making, forging and counterfeiting a certain acquittance," &c.

A motion in arrest of judgment was made on the ground of insufficiency in the bill, which motion was overruled by the court, on which the defendant appealed to this court.

SEAWELL, J. The question for this court is, in substance, whether the State be entitled to *any* judgment upon the finding of the jury? The false making, or alteration of any written instrument whereby another may be prejudiced, with intent to deceive or defraud, by the common law constitutes a forgery; the indictment clearly contains such a charge; and the defendant being found guilty of every thing contained therein, there must be judgment for the State.

HALL, J. DANIEL, J. and RUFFIN, J. concurred.

STATE *vs.* JOHN WALKER—Page 230.

It is the province of a Judge, in a case of homicide, to explain the law to the jury, leaving to them the exclusive decision as to the truth or falsehood of the facts given in evidence; Hence it is not improper for him to charge the jury that "the prisoner was guilty of murder, or guilty of no offence at all—that it was not a manslaughter case;" if the facts deposed to by the witnesses, if believed, established a case of murder.

The negro slave in question belonged to John Guy. He ran away on Sunday night, and on Monday about 12 o'clock he was apprehended at Peter Hairston's, nine miles distant

from Guy's. Within a few minutes after the negro was apprehended, Walker, the prisoner, came to the house of Hairston, and was requested by Hairston to take the negro home. Walker agreed to take him; and Terry, the overseer of Hairston, tied his arms above the elbows to a stick across his back, and in this situation he was delivered to Walker, who was on foot and walked with the negro. At the distance of about six miles from Hairston's in Wall's lane, the negro fell down. Wall came out from his house: Walker assisted the negro to get up, and the negro walked towards the gate: but before he reached the gate he fell twice, each time falling on his face. The negro asked for water, which was given to him, and he drank more than usual. Walker then asked Wall if he had any spirits? He said yes, and brought some. Walker took a dram and gave one to the negro. He then requested Wall to give the negro something to eat, the negro saying he had eat but very little for several days—Wall gave him some bread.

After resting a little time at Wall's gate, Walker started with the negro. It was early in February and the day very cold, and the sun about one and a half hours high in the evening. Wall was doubtful whether the negro was sick or deceitful; but did not hear Walker give any opinion, further than saying to the negro, "He had come on very well, until he had gotten to Mr. Wall's Lane; that he had there fallen down, and if he did not go on better, he should be under the necessity of compelling him." At the distance of six hundred yards or thereabouts from Wall's house, Walker and the negro passed Webster and his son; Walker had two untrimmed switches in his hand. He was asked by Webster, "Whom he had there"—he answered, "A runaway, a damned sullen fellow, who would not go along; and he would kill him, if he was his own, but he did not like to be hanged for killing a negro." The negro was walking slow and Webster thought, appeared weak. Having passed Webster a little distance, Walker gave to the negro two stripes with a brushy switch which he had in his hand, and having gone to the distance of an hundred yards or thereabouts,

Webster looked back and saw the negro down in the road, and Walker whipping him, he supposes with the switches, which he had in his hand, when he passed him. Webster thought Walker gave the negro an hundred stripes, but he could not speak with any certainty as to the number. The negro had on a great coat and those stripes were given whilst he lay on the ground.

The negro and Walker were then distant about three hundred yards from Foy's shop. Foy heard a noise down the road, and he told Williams to go and see what was the matter. Williams went and found the negro standing in the road, and Walker a few yards from him. After some conversation with Walker about the negro, and Walker saying he was a sullen fellow and had fallen down and would not go along, the negro started and walked about fifty yards, when he fell down on his face. As soon as he fell, he turned his head, so as to take his face from the ground; and Walker having an untrimmed Gum-switch in his hand, came up and applying both hands to the switch, struck him with it twice, violently, across the face. The switch was nearly an inch in diameter at the but end. Then taking one end of the stick tied across his back he turned him over and dragged him by the end of the stick about six feet. The negro then said, "Pray, sir, untie me." Williams advised Walker to untie him: Walker refused. Walker and Williams then assisted the negro to get up, and the negro walked a short distance and fell again on his face. Walker stepped up to him and kicked him on the hinder part of the neck with violence, and immediately kicked him on the side of the head with like violence; which last kick turned his face from the ground, so that the side of the head lay on the ground. Upon receiving the last kick, the negro appeared to suffer a violent emotion in his countenance and in all his body. Walker then cut the string from one arm and partly cut it from the other. He requested Williams to untie the string, which Williams did with difficulty, as his fingers were benumbed with cold. Walker took the string, put it around the negro's neck, and gave it a jerk, which

raised the head a little from the ground, and the negro's under jaw was observed to fall. Williams had a horse, and Walker proposed to put the negro on the horse and take him to the shop; Williams, at first, objected; but they put up his breast on the saddle. Having gone about 20 yards, Walker walked round the horse and Williams asked him, "How the negro looked." Walker answered "the scoundrel is holding his breath." They proceeded about 80 yards further and Walker went round the horse, and Williams again asked him, "how the negro looked?" Walker answered, "the rascal is still holding his breath." They then determined to take him down, and Foy and his son having come up, assisted in taking him to the shop, where he was placed on a plank. Williams thinks the negro never breathed after the second kick aforesaid on the head. Whilst the negro was on the saddle, Williams observed that he thought he was dying: Walker answered that he was only deceitful.

Williams thought it was about 20 minutes from the time he came up until the negro was untied. That the negro was very weak, and that keeping him tied was unnecessary. He thought that a child of seven years old could have managed him.

Walker is a healthy man, aged about sixty years. The negro was a stout fellow aged about twenty-one years.

After placing the negro on a plank in the shop, Walker observed that he believed he was dead; and immediately went on to his owner, Mr. Guy. He told Guy that his negro was at Foy's shop, but did not mention to him that the negro was dead. Guy took irons to put on the negro. And on the way to the shop, Guy observed, that he feared the negro would be gone before they reached the shop: Walker then said, he expected he would not, and that he feared he was dead. He did not inform Guy of the circumstances of his ill-treatment to the negro. Walker remained in the neighborhood until he was arrested.

The negro died on Monday evening, and on Wednesday an inquest was holden. Several of the jurors of the inquest were of opinion that the negro's neck was dislocated, and

that one of his eyes was destroyed. There was a dent in one of his temples, but whether the skull was fractured or not, was not known. One of the jurors thought that it was. There was a wound across the forehead and some of the witnesses thought it was produced by the stroke of a hickory: others that it was occasioned by his fall on the ground. The upper lip was swelled, and some blood oozed from the gums. He was stripped and examined, but there was no appearance of any injury on any other part of his body.

His Honor the Judge charged the jury that the prisoner was guilty of murder, or guilty of no offence at all. That he did not think it was a madslaughter case. The jury found the prisoner guilty of murder, and a new trial was moved for on behalf of the prisoner, on the ground that it ought to have been left to the jury to say, whether the prisoner was guilty of manslaughter or murder. This motion was disallowed and an appeal was prayed for to the Supreme Court, which was granted, and the following reasons were filed for the said appeal by the counsel for the prisoner—viz.

"That it ought to have been left to the jury to say, whether the prisoner was guilty of manslaughter or murder: for

"1st. That in capital cases the jury are to judge of the law and of the facts. 2d. That the court is not to pronounce an opinion whether the prisoner be guilty of manslaughter or murder. 3d. That if the jury believed the prisoner thought the negro was deceitful only, and that was the cause of his falling down, the prisoner had cause of provocation, and if in this provocation he treated the negro with cruelty which occasioned his death, it ought to have been left to the jury to say, whether death was the probable consequence of this cruelty. And 4th. That the prisoner had the right to inflict upon the negro such correction as was necessary to make him proceed on the road home: That the law disregards the mode of correction, and looks only to degree of it; and it ought to have been left to the jury to say, whether the correction given by the prisoner was such that death was or was not its probable consequence."

Murphey and *Norwood* for the prisoner.

TAYLOR C. J. It is the province of the court to pronounce whether the Judge who tried the cause drew the correct legal conclusion from the facts set forth in this record, which must have been made up from the evidence given in the cause, and stated to the jury in the summing up. To me it appears very clear, that the statement of facts shews the prisoner to have been guilty of murder in point of law; and as the Judge who tried the cause was of that opinion, he was bound to state it to the Jury; that if he had left it to them, without instruction, to pronounce whether it was murder or manslaughter, he would have departed essentially from the purpose for which he presided over the trial, viz. to cause the law to be duly administered. The reason given for a new trial, viz. "that the court is not to pronounce an opinion whether the prisoner is guilty of murder or manslaughter," can only be correct, upon the supposition that the court undertakes to pronounce upon the truth or falsehood of the facts given in evidence. But no such complaint is made in the case; and the supposition is wholly inadmissible. The charge of the Judge appears to have corresponded with what Lord Vaughan calls the *discreet* and *lawful assistance* of a Judge to a Jury, which is to give them an hypothetical direction: Not by previously having their answer to the fact, and then declaring the law to control their verdict, but to leave their conduct free, by instructing them how the law is, *if they find the facts.* This is also conformable to the opinion of the best writers on criminal law: "In every case, where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing or alleviating; the matter of fact is the proper and only province of the jury. But whether upon a supposition of the truth of facts, such homicide be justified, excused or alleviated, must be submitted to the court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper provice of the court." Foster 255.

I do not doubt the right of the jury, affirmed in the first

reason, to judge of the law and of the facts; but they would often be much at a loss to exercise this right, if they were not told by the court how the law is: And, according to the sentiments of Mr. Justice *Foster*, they will, "if they are well advised, always find a general verdict, conformably to such directions." I take it for granted, as the contrary is not insisted on in the case, that the Judge proceeded as is usual in other cases; that he stated to the jury what the witnesses had testified, and then told them if they believed the witnesses, the offence established against the prisoner was murder in point of law; and not manslaughter, or any inferior species of homicide. In this I perfectly concur, and think justice has been done, as far as a court has any lawful agency in administering the law.

SEAWELL J. We are *all* of opinion, that the directions of the Judge below, were in accordance with the law arising from the evidence, and that in the manner of delivering them, he neither transcended the Act of Assembly, or invaded the province of the jury; that, in short, he confined his charge to the legitimate functions of a Judge, explaining what was the law, *if* the facts given in evidence were true, leaving it to the jury to determine upon their truth or falsehood.

It has been insisted on for the prisoner, that the court should have stated to the jury, *so much* of the case from the evidence as would have made it manslaughter, and then informed them, if they disbelieved the other part of the evidence, that then the case would be manslaughter, and not murder. It is true, the Judge might have done so, but in not doing it, surely there was nothing *denied* the prisoner; for such a charge would be giving to the State *two* chances for conviction, whereas according to the course pursued, the jury were directed to acquit, unless they believed *all* the testimony; and if it *was* true, no one will doubt the propriety of the verdict: Of this it was the peculiar province of the jury to judge. They did believe it, and have found accordingly; and had the case come up on their finding, we

see no possible ground for being dissatisfied with their verdict. The rule for a new trial must therefore be discharged.

Lowrie, J. Daniel, J. and Ruffin, J. concurred in this opinion.

[The prisoner was pardoned by Governor Miller.]

STATE *vs.* AVERA—Page 237.

If a man is indicted for perjury in swearing that he did not *execute* a certain deed, and the jury find specially that he is guilty of perjury in *denying his signature*, the judgment must be arrested; for a deed may be executed without actual signing; and when from the finding of the jury the defendant may be innocent, he will not be presumed guilty.

The defendant was indicted for perjury committed before the Grand Jury of Johnston Superior Court, while they had under examination an indictment preferred against S. Norsworthy for forgery. This bill charged Norsworthy with forging a deed under the hand and seal of Avera, and for uttering and publishing the same, knowing it to be forged. Avera swore before the Grand Jury that he did not execute the said deed, but that it was forged by Norsworthy, and wilfully uttered by him. The assignment of perjury was in the falsehood of this oath, the indictment averring that Avera did execute and deliver the deed.

The jury found specially that Avera was guilty of the perjury assigned, in denying the signature of the deed, and not guilty of that assigned in charging Norsworthy with having forged or altered it.

Nash and *Badger* for the defendant, stated several reasons in arrest of judgment; but the two following were finally relied upon, and argued with much force and ingenuity.

1. That the indictment concludes "against the peace and

dignity of the *said* State;" and not "against the peace and dignity of the State," as prescribed by the constitution.

2. Because the verdict of the jury is equivalent to a verdict of acquittal, and should have been so entered up.

SEAWELL, J. delivered the opinion of the court.

The charge in this indictment against the defendant is, that on a former bill before the Grand Jury he swore "that he did not *execute*" a certain deed, but that it was forged by Norsworthy. The jury find him not guilty of the perjury, so far as relates to the charge that he swore Norsworthy forged the deed; but guilty in "*denying his signature.*" Now the defendant *might* have executed the deed, and still the fact be, that he never actually signed it; as in a case where one person signs another's name by direction, and a sealing and delivery takes place by the party whose name is so written. In a case, therefore, quite supposable, wherein the defendant *may* be innocent, it is certainly against all authority to *presume* him guilty. There must, therefore, be judgment for the defendant.

NOTE.—See *State* v *Bright*, 2 Car. L. Repos. 634. *State* v *Arrington*, 3 Murph. Rep. 571.

CHEATHAM, ADM'R OF DELOACH *vs.* BOYKIN & HORRELL.
Page 238.

A refunding bond given by a distributee is not void because but one surety is given. The one is not less bound than if two or more had been given.

This was a *scire facias* sued out on a refunding bond entered into by L. Boykin upon receiving a distributive share of J. Boykin's personal estate; Howell was the security in the bond, and the plaintiff's intestate was a creditor of J. Boykin, against whose administrator he had obtained judgment; but the property having been all delivered over to the

distributees, the proceeding on his bond, directed by the act of Assembly, was resorted to. Judgment was rendered for the plaintiffs on the *sci. fa.* on which the defendants filed these reasons in arrest.

That the refunding bond has but one security. 2. That the bond was filed and rescorded three years after its execution, when by law it should have been filed at the succeeding term.

The cause was argued at Northampton Superior court before TAYLOR, C J. who overruled the reasons in arrest.*

The cause was submitted here without argument.

SEAWELL, J. It is difficult to discover the principle upon which the defendant's objection rests; the act of Assembly requires from the administrator that he should before delivering over the distributive share (and in like manner of executors as to legacies) take from the party a bond, with *two or more able* sureties to refund in case of debts. The administrator has taken the bond from the defendant; but he objects to being bound thereby, because there was but one surety taken; and I suppose if two had been taken he would then have said, he ought not to be bound, because they were not able. Whether the administrator could shelter himself from the claim of creditors by this bond, is another question: but as regards the defendant, the administrator has not imposed upon him, any obligation unauthorised by law, nor has he taken any bond which the law forbids. On the contrary, he has taken the precise one required by law; but has omitted to have it signed by as many persons as he was directed. In other words, he has done nothing which the law did not require; but has not done all it required; in

* The first reason was chiefly pressed in the court below, on which the opinion there given was as follows. PER CURIAM—The act of 1789, c. 23, certainly requires the administrator to take a bond with two or more able sureties; but that is for his own protection, and if he chuses to risk it on one security as against creditors, that security has no cause of complaint. I cannot distinguish the case from the Sheriff's taking one bail, which he may do if he please; yet it is no objection in the mouth of the bail. Cro. Eliz. 672, 808.

point of law therefore the bond is not void; and in reason and honesty there can be no ground to impeach it. There ought therefore to be judgment for the plaintiffs.

HALL, J. DANIEL J. and RUFFIN, J. concurred.

NOTE.—As to the validity of a bail bond with one surety, see *Arrenton v Jordan*, 4 Haws 98.

SNEED AND OTHERS *vs.* W. AND J. HARRIS—Page 240.

Where a testator bequeathed to his wife "two negroes, during her natural life, and one half the tract of land which I now live on, during her natural life, and then to return to my son William;" *it was held*, that the limitation to the son was confined to the land, and that the negroes were distributable after the death of the wife among the next of kin of the testator.

This was a petition brought by certain of the next of kin of James Harris against his executor, to obtain distribution of some slaves, and other chattel property, bequeathed by the testator to his wife for her life, but of which, the petitioners allege, no disposition is made by the will, after the death of the wife. On the other hand, the defendant, William, claims it as bequeathed to him by the will, and the whole controversy arises from the following clause, viz. "I give and bequeath to my beloved wife Nancy, two negroes to wit: Alcy and Suck during her natural life, also three cows and calves, one sorrell horse, one bed and furniture. And one half the tract of land that my son James Harris is bound to make me a right to which I now live on, or if he do not chuse to make me a good and lawful title, to have one half of the land that I have, upon my son James Harris to make me a title, to buy her a place to live on during her natural life, and then to return to my son William."

The case was submitted without argument.

SEAWELL, J. delivered the opinion of the Court.

The bequests of the negroes to the wife for life, is a clear

definite estate, and the subsequent limitation is engrafted in a separate and distinct sentence, by which the testator devises to his wife an estate in lands. This is the natural and necessary construction, and must prevail, unless controled by some other part of the will. In looking into the whole will, there is nothing which shows the testator intended a different meaning. There must be a decree for the petitioners.

NOTE—See *Anonymous*, 2 Hay. Rep. 161. *Black* v *Ray*, 1 Dev. & Bat. Rep. 334. See also *Jordan* v *Hallowell*, ante 173, and *Wiggs* v *Sanders*, 4 Dev. & Bat. Rep. 480—cases upon the construction of deeds.

BOWEN AND STONE *vs.* LANIER—Page 241.

An order of the county court for the sale of land, after a constable's levy and return of no chattels, is not judgment, though it may have the quality of one in attaching a lien upon the land. Hence a writ, which cannot be sustained, unless there be a judgment or something equivalent, will not lie upon such an order.

Errors in law cannot be assigned to process in the nature of an execution, for that, if irregular must be set aside in a different way; as by motion, *supersedeas* or the like.

This was a writ of error sued out of Rockingham Superior Court, to reverse certain proceedings which commenced by a warrant issued by a magistrate, and terminated in the County Court. The warrant was as follows.

"STATE OF N. CAROLINA; } To any lawful officer to ex-
Rockingham County, } ecute and return within 30 days, Sundays excepted. You are hereby commanded to arrest the body of *Ezekiel Bowen*, and him safely keep so that you have him before some justice of the peace for the said county to answer the complaint of Sampson Lanier on a note of fraud for 56 dollars. Herein fail not. Given under my hand, this 27th July, 1808.

JA. LADD. [Seal.]

The service of the warrant was acknowledged and judgment confessed on the day it bears; when also the defendant stayed execution, and gave B. Stone as security. An execution was endorsed on the warrant in the following words:—

"*Rockingham County.*—Of the goods and chattels, lands and tenements of the defendant and security, you are hereby commanded to execute and cause to be made the sum of the above.

20th February, 1809. A. PHILIPS.

On these proceedings the constable made a return on the 27th February 1809, that there were no goods and chattels to be found, wherefore he had levied on three tracts of land, to satisfy this and four other executions against the defendant at the suit of the said plaintiffs.

On the return of these proceedings to the County Court on the last Monday in February in the same year, a motion was made for a *venditioni exponas*, which was accordingly ordered, and issued in the following words. "Ordered by the court that so much of the lands of the defendants already executed by a constable be sold as will satisfy a judgment obtained against them by S. Lanier for the sum of twenty eight pounds, besides fees." At the following sessions, the execution was returned "satisfied by the sale of land." The following assignment of errors was made.

1. That in the judgment rendered in the County Court of Rockingham, there is error in this, that the writing purporting to be an execution issued on a judgment rendered by a justice, was not a valid and legal execution, but was void.

2. That the writing purporting to be a judgment rendered by a justice was not a sufficient and legal judgment, upon which an execution could be issued, but was void.

3. That the writing purporting to be a warrant or the leading process, was not a sufficient and legal warrant, but was void.

4. That there was no leading process or warrant.

5. That the papers on which the said judgment was ren-

dered by the justice were not returned to the County Court aforesaid which rendered the judgment for the sale of the land.

6. That the said execution was not returned to the next County Court held for the said county, after the levy thereof on the said lands; the Court commencing the same day the levy was made, viz. 27th February, 1809.

7. That the justice to whom the constable returned the execution, did not return the same to the next court held for the said county, after the levy thereof on the said lands; the court commencing the same day the levy was made, viz. 27th February 1809.

7. That the justice to whom the constable returned the execution, did not return the same to the next court held for the said county, after the execution was returned to him by the constable.

Murphey for the plaintiffs in error. *Norwood* for the defendant.

SEAWELL, J. delivered the opinion of the court:

It is an essential foundation to support a writ of error that there be a judgment, or something, which is to be considered as such. None of the errors assigned in this case, if they are all to be viewed as errors in law, apply to the rendition of the judgment: they merely apply to the process in the nature of execution to enforce the judgment, which, if irregular, must be set aside in a different way; as by a motion, supersedeas, or the like. The order of the county court after a return by the constable of a levy on the lands, cannot in any wise be regarded as such—it may possibly be considered as having some effect upon their liability to answer the demand, and in that respect, have the quality of a judgment: but it is not that act of the court which determines the Plaintiff's right to the thing demanded; that was previously ascertained by the judgment of the justice. There was no examination of the plaintiff's demand, nor day given to the defendant to make defence:—It was simply an application to the court to award execution of sale against the lands of the defendant previously levied on, an the pro-

cess then issued, if *informal* or *irregular*, must be set aside, as any other execution; if void, it was of no force or effect, and consequently displaced no right of the present plaintiffs in error. The judment however cannot in any event be affected by a writ of error, for it was rendered by a court, not of Record, and consequently, must stand unreversed by this Court.*

*RUFFIN, being concerned while at the bar, as counsel, gave no opinion.

NOTE.—By the act of 1822 (1 Rev Stat. ch 45. sec. 8 & 9, a justices' execution is levied upon land and returned to court, the plaintiff may upon application to the court, have a judgment there entered up for the amount of his recovery and costs.

LINCH *vs.* GIBSON AND OTHERS & E. CONTRA—Page 244.

Where A. contracted to sell a tract of land to B., by a written agreement, and gave up the possession to B., with an express stipulation that the title should remain in the vendor, till the purchase money was wholly paid, and afterwards an execution issued against A., which was levied upon this land, and it was sold to C., who had notice of B's equitable claim, *it was held* that the land was liable to the execution which, with the sale, divested A's legal title; but that as B. purchased with notice of C's equitable claim, he should convey to him upon receiving the unpaid balance of the purchase money.

D. & B. Fisher were seised of a tract of land in Guilford County, which the former, in behalf of himself, and as agent for the other, agreed to sell to Linch, to whom he executed a parol contract to make a title, when the purchase-money $278 should be paid; the contract expressly stipulating that the title was to remain in the Fishers until the whole of the consideration money, with interest, was paid.

The contract was dated the 4th of February, 1801, and immediately thereafter Linch took possession of the land, and continues still to reside there.

In the year 1804, the Fishers instituted a suit against Gibson, which they afterwards dismissed, and an execution for the costs issued against them, which was levied by the Sheriff of Guilford upon the land aforesaid, which he duly sold on the 15th of February, 1806, to Gibson, who receiving a conveyance, instituted an ejectment against Linch. The latter then filed a bill in equity against Gibson and the Fishers, praying an injunction against Gibson to stay his proceedings at law, offering to repay him the money advanced in the purchase of the land; and praying that he might be decreed to convey such title as he had acquired by the Sheriff's sale: The bill further offered to pay to the Fishers the residue of the money due upon the contract, after deducting what had been paid by Gibson to the Sheriff, and concluded with the prayer, that he (Linch) might be quieted in his possession.

Gibson in his inswer, admitted, that when he purchased from the Sheriff he had notice of Linch's purchase from the Fishers; and offered to convey to Linch, upon his paying him the money which Linch still owed for the land, which he claimed upon the ground that the Sheriff's sale to him comprehended all the title and interest of the Fishers.

The Fishers then filed their cross bill against Gibson and Linch, praying that an account might be taken of the purchase-money; that Linch might be decreed to pay it to them, and receive a conveyance from them; and offering to pay Gibson the money he paid the Sheriff, provided he was entitled to it.

DANIEL, J. The legal title to the land mentioned in the bill was in Daniel Fisher and his brother. The bond given to Linch to make title when the purchase money was paid transferred nothing at law, it only gave the complainant Linch an equitable title when the money was paid. The *fi. fa.* which issued from Salisbury Superior Court for the costs, in consequence of the Fishers having been nonsuited in their action against Gibson, legally covered the land. The sale and deed made by the Sheriff on the 16th of Febeu-

ary 1806, to Gibson, transferred all right, title, and interest, which the Fishers had in the lands. The cross bill brought by B. Fisher and others, against Gibson and Linch, must be dismissed as they have no title either in law or equity.

In the other case, I am of opinion, as Gibson purchased the land with full notice of the complainant's equity, he is not put in any better situation than the Fishers would have been, provided the execution and sale had not been made; therefore he should decreed to convey to Linch on the payment of the money mentioned in the bond.

NOTE.—See *Kay* v *Webb*, 1 Murph. Rep. 134. *Freeman* v *Hill*, 1 Dev. & Bat. Eq. Rep. 389. *Dudley* v *Cole*, Ibid 429.

At January Term, 1818.*

SLEIGHTER *vs.* HARRINGTON'S EX'TR'X--Page 249.

An executor, who promises to pay a debt of his testator, and has assets at the time of the promise, is personally bound.

The plaintiff declared, that the defendant's testator being executor of Robert Troy, promised, in writing, to pay a debt due from Troy to him; and that at the time of the pomise he had assets, which is admitted. The question referred to this court is, whether having assets alone, without any new contract or agreement, is sufficient to charge a person in a representative character on a promise so made, *de bonis propriis.*

Shaw, for the plaintiff, relied upon express adjudications, and cited 1 Cro. Eliz. 91. Douglas 115. Cowper 284, 289.

A. Henderson, for the defendant, contended that some of the cases relied upon had been overruled, and that no principle could be extracted from the others fairly applicable to the support of the declaration. 7 T. Rep. 346, 350. 2 Saun. 137. 1 Com. on Con. 533, 2 H. Bl. 618.

Hall, J. That an action will lie against an administrator or executor, upon a promise to pay in consideration of assets, seems pretty clear from the following cases: *Trewinian* v *Howell*, Cro. Eliz. 91. *Atkins & wife* v *Hill*, Cowp. 284. *Hawkes & wife* v *Saunders*, Cowp. 289: 1 Ves. 125. It is true, the cases cited from Cowper, are cases of legacies sued for, and although they have been much shaken, if not overruled, in the case of *Dicks* v *Street*, 5 Term 690, the principle of decision in the latter case was upon a different ground from that now before the court. Two out of three of the Judges, held, that an action would not lie at common law for a legacy, because Courts of Law had no power to

*Taylor, C. J. was unable to attend court towards the end of the Term, and was absent when the opinions were delivered.

compel a husband, who sued for his wife's legacy, to make a settlement upon her; but a Court of Equity had. Not any of the reasoning in that case applies to debts which an executor or administrator promises to pay in consideration of assets. If they have money in hand, there is no reason why they should not pay; if they have property, which they use diligence in converting into money, and some accident happen to it not within their control; or if, in the mean time, they have notice of debts of higher dignity, they ought to be at liberty to shew these things in their defence. See Coke, in William Bane's case. 9 Coke 94. The promise, as was said by Lord *Mansfield*, in *Cleverly* v *Brett*, and another, executors, 5 T Term 8, *note*, eases the creditor from proving assets, and throws the *onus* on the other side. I think there ought to be judgment for the plaintiff.

Seawell, J. Where an action is brought against an executor or administrator upon *his* promise to pay a debt, if he has assets, the promise will bind him *de bonis propriis*; and though in the declaration assets must be averred, yet proof of the promise is so far *evidence* of assets, as to place the *want* of them, to be proven by the executor or administrator. As the assets are the consideration which make the promise binding, whenever it shall be shown by the defendant that there are none *subject* to the plaintiff's demand, the promise is then *nudum pactum*, and will not support an action: and this the executor or administrator may do, by *any* evidence which would protect him against the plaintiff, if the action had been brought against the defendant *as* executor or administrator: as by *payment* without notice to inferior debts or those of equal dignity, or judgments, or by showing debts of higher dignity, or the like. As this case appears to be a promise *with* assets, I think there should be judgment for the plaintiff. But I cannot assent to the opinion that the promise by the executor or administrator has any other effect, than as regards the *form* of the action, and that this *formal* promise makes him *personally* liable, *only because* he was before liable *as* executor or administrator.

I can see no analogy between the case of a *promise* to

pay a debt of inferior degree, and the *actual* payment: for in the former, there is only an *undertaking*; but in the latter, the thing is done, and it is not in the power of the executor to recover it back.

RUFFIN, J. The case is, that Troy was indebted to the plaintiff and died, having appointed H. W. Harrington his executor, to whose hands sufficient assets came to pay the plaintiff's debt; and that H. W. Harrington having assets as aforesaid, promised the plaintiff in consideration thereof, to pay the said debt; that he afterwards died, leaving the defendant his executrix. This action is brought against the defendant, as executrix of H. W. Harrington, to subject his estate upon his promise. The defendant pleaded *non assumpsit*, upon which issue was joined and a verdict for the plaintiff. A motion is now made in arrest of judgment, because there was no consideration for this promise.

I always considered it as a point perfectly settled, that the promise of an executor, having assets at the time of the promise, to pay his testator's debts, was valid.

Upon looking into the authorities, we find many cases wherein it has been expressly decided, besides numerous sayings to the same effect in Elementary Books. Among others, are the cases of *Trewinian* v *Howell*. Cro. Eliz 91. *Reech* v *Kennegal*. 1 Ves. 126. Bane's case, 9 Co. 94, and those cited in the argument from Cowper. Such a promise is enforced, and supported by the consideration of the executor's *liability*, as executor, to pay the plaintiff's demand. He is liable by reason of the assets, and therefore the having of assets is indispensable in such a case. When I speak of assets, as relates to this subject, I mean such estate of the testator as would at that time be liable to the debt of the creditor in a suit at law—If, for example, the creditor be so by simple contract, the assets in the hands of the executor, necessary to support the assumpsit of the executor, must be such as the creditor would be entitled to recover, if he were then suing the executor, in his representative capacity, for his debt. The executor, therefore, is the *mere hold-*

er, as it were, of money, which is in justice and conscience another's.

The consideration may, therefore, be said to consist of the strongest moral obligation, as well as a legal liability. The only case relied on to contradict this reasoning, and the strong current of authorities for the plaintiff, is that of *Ram* v *Hughes*. 7 T. R. 350. But in that case there was no averment of assets. It is said, indeed, that Hughes died possessed of sufficient effects. But it is not alleged that they *ever* came to the defendant's hands, much less that she had them *at the time* of her promise. The note of the case in Term Reports seems to me to be a confused one—but its accuracy, in this respect, is evinced by what fell from Lord *Mansfield*, in *Hawkes & ux* v *Saunders*, Cowp. 291, where he mentions and comments on this circumstance. I agree, therefore, with my brethren, that the plaintiff is entitled to judgment; but I cannot accede to the opinion that the defendant would have been at liberty upon the trial to shew that her testator, Harrington, after his promise, applied the assets to other debts of the testator Troy, and thereby excuse himself from the payment of this debt. If his promise was good at all, it made the debt *personal*. There is no half-way ground: Harrington must be considered as liable only in his representative capacity, if he is allowed to shew the state of the assets subsequent to the time of his promise. But when we say that by his promise he became *personally* bound, we lose sight of the assets altogether, except so far as regards their situation when the promise was made. In that respect we are obliged to examine into them, for the purpose of ascertaining whether the promise was *then* good or a *nudum pactum*. If he *then* had assets, we all agree that the promise is *good*, and he becomes personally liable. It appears to me that settles the other point; for whenever one becomes *personally* bound for the debt of another, (no matter how) it becomes *his own debt*, and must be paid out of *his own estate*. Nothing but actual satisfaction, or other matter, which would discharge him from *any other of his own personal debts*, will discharge him from *this*.

In Bane's case, Lord *Coke* is express that an executor can only shew, upon the trial, that he had no assets *at the time* of the promise. The short note of *Cleverly* v *Brett*, cited in *Pearson* v *Henry*, 5 T. R. 6, relates, as well as the principal case, to the question of assets, on the plea of *plene administravit*, in a suit against the executor, as such, which is totally different from this. There the question is, what assets the defendant has, at the time of the plea pleaded, and does not regard the personal liability of the defendant at all.

DANIEL, J. concurred in opinion with RUFFIN, J.

NOTE.—See S. C. reported, but without the opinion of SEAWEL, J. in 2 Murph. Rep. 32. See also *Williams* v *Choffice*, 2 Dev. Rep. 333.

STATE *vs.* CROWELL—Page 254.

A person, who contracts with the county to keep a bridge in repair, is indictable for neglect of that duty.

The defendant was presented by the Grand Jury for a Nuisance, and the case was referred to this court upon the question whether an indictment could be sustained upon the following statement of facts. That the defendant is bound to keep up the bridge described in the indictment, for seven years, for the due performance of which he executed a bond; that the time is not yet expired. The bridge is admitted to be out of repair. The defendant is not overseer of the road.

SEAWELL, J. delivered the opinion of the court:

The *law* authorises the trustees of the County Courts to contract for the building and repairs of bridges. Whatever the trustees do under this authority, they *do* in *behalf* of the public; and the contract is substantially between the *public* and the *undertaker*, through the *instrument*, the County Court; and if the undertaker by not performing his agreement, occasions an *inconvenience* to the public, he is indictable. There must be judgment for the State.

STATE *vs.* JOHN HOGG—Page 254.

NOTE.—See S. C. reported in 2 Murph. Rep. 319.

GOODE *vs.* GOODE—Page 255.

NOTE.—See S. C. reported in 2 Murph. Rep. 335.

LONG *vs.* BEARD AND MERRILL—Page 256.

NOTE.—See S. C. reported in 2 Murph. Rep. 337.

DEN ON DEM. OF BURTON *vs.* MURPHY—Page 259.

NOTE.—See S. C. reported in 2 Murph. Rep. 339.

DEN ON DEM. OF BOWEN *vs.* McCULLOUGH—Page 261.

A sale of land under a *fi. fa.* which issued and bore *teste* after the death of the person who died seised, without any *sci. fa.* against dis heirs or devisees, conveys no title to the purchaser.

This was an action of Ejectment brought for the recovery

of a lot in Washington, described in the plaintiff's declaration The lot was admitted to have been the property of Dr. Tennant Bowen. At December Term, 1801, a judgment was rendered in behalf of the United States, in the United States' District Court for the District of Pamlico, against the said Tennant Bowen; on which judgment a writ of *fi. fa.* against the goods and chattels, lands and tenements of the said Tenant Bowen, was issued from the same term of said court, and returned levied on sundry negroes; writs of *venditioni exponas* continued to issue from term to term until February Term, 1809, when the said negroes were sold for a sum less than the amount of the said judgment. From the October Term, 1809, of said court, there issued on said judgment a second *fi. fa.* against the goods and chattels, lands and tenements of the said Tennant Bowen, under which there was a levy on the lot in dispute, and the same was exposed to sale, and the defendant became the purchaser, to whom the Marshal executed a regular conveyance. Tennant Bowen died in the year 1803 or 1804, leaving a last will duly executed, to convey lands, by which will the premises in dispute were devised to the lessor of the plaintiff.

RUFFIN, J. delivered the opinion of the court:

The United States recovered a judgment against T. Bowen, on which a *fi. fa.* issued, was levied on certain slaves and returned. Bowen then made his will, and thereby devised the premises in dispute to the lessor of the plaintiff, and died. After his death, several writs of *venditioni exponas* were issued to compel a sale of the slaves before levied on, under one of which they were finally sold, some years after T. Bowen's death, but did not satisfy the debt. Whereupon a new *fi. fa.* against the goods and chattels, lands and tenements of T. Bowen, the testator, was sued out and levied on the lot in question, which was sold, and the defendant purchased and entered. The question is, was that sale a good one, so as to pass the title to the defendant?

Without considering the operation of a judgment upon lands in this State, or decided whether it binds from the time of the judgment, or whether lands are only bound from the *teste* of the execution; but assuming the law to be either way, this case seems to me to be against the defendant. If the former, and our *fi. fa.* is to have the operation of the *elegit*, then a *sci. fa.* was necessary, and is the only way by which the plaintiffs could have execution of the lands. 3 Rep. 12, 2 Saun. 6, n. 1, and the authorities there cited. And a sale without a *sci. fa.* is void, so that the heir can maintain his action against him who enters under it. Fitz. N. B. 597, 598, D. On the other hand, if lands are bound in the hands of the heir by the *fi. fa.* as goods are by that writ in the hands of the executor, then, although they might have been sold after the death of the testator, upon a writ *tested* on a day previous to his death, they cannot be sold in any other case, unless the judgment be first revived by *sci. fa.* *Baker* v *Long*, 1 Hay. Rep. 1. *Heapy* v *Paris*, 6 T. Rep. 639. *Bragner* v *Longmead*, 7 T. R. 20. As to a sale under a *venditioni exponas*, that stands on different grounds. That writ is not to *authorise*, but to *compel* a sale of property, previously *in custodia legis*. Cro. Jac. 73, 1 Ves. 196. As this *fi. fa.* therefore issued, and bears *teste* long after T. Bowen's death, and has no relation to a day antecedent to that event, it passed no title whatsoever, and judgment must be entered for the plaintiff.

NOTE.—See acc. *Wood* v *Harrison*, 1 Dev. & Bat. Rep. 356.

WRIGHT *vs.* YARBOROUGH—Page 263.

The penalty for setting fire to the woods is incurred under the acts of 1777 and 1782 (1 Rev. Stat. ch. 16) unless two days notice is given to the owners of adjoining lands; and an agreement of one neighbor to take shorter notice will not bar a stranger from recovering the penalty under those acts.

This was an action of debt to recover the penalty under the act of Assembly, to prevent the firing of woods, &c. It appeared in evidence that the defendant had informed one of his neighbors who had lands adjoining his, that he intended to fire his woods in a short time thereafter, upon which his neighbor replied to him that a few minutes notice would do for him; the defendant accordingly gave him notice about an hour before he set fire to his woods. The court directed the jury to find for the plaintiff, as the notice was not sufficient under the aforesaid act. The case therefore comes up to the court on a motion for a new trial—on the ground that the charge of the court was against law. The defendant had other neighbors besides the one above alluded to, but the court would not permit him to show whether he had given them sufficient notice, until it should first be decided whether the above notice was sufficient.

DANIEL, J. delivered the opinion of the court:

The act of 1777, c. 25, sec. 2, makes it unlawful for any person whatever to set fire to any woods, except it be his own property, and in that case it shall not be lawful for him to set fire to his own woods without first giving notice to all persons owning lands adjacent to such wood lands intended to be fired, at least two days before setting such woods on fire, &c.

The act of 1782, c. 29, sec. 2, says "every person offending against the above act of 1777, shall forfeit and pay for every such offence, the sum of twenty five pounds specie to be recovered by action of debt, bill plaint, or information, to the use of the person who shall sue or prosecute for the same, and be liable to an action to the party injured," &c.

This being a penal action, which might have have been brought by any person, the defendant cannot resist the plaintiff's recovery without shewing he gave the two days notice required by the act. The assent of a neighbor to take shorter notice than the law prescribes, does not prevent the penalty from being incurred. Motion for a new trial overruled.

NOTE.—The penalty under the acts of 1777 and 1782 is only incurred by a voluntary firing the woods, and not to a burning them from necessity. *Tyson* v *Raspberry*, 1 Hawks 60.

BOZMAN *vs.* ARMSTEAD AND FESSENDEN—Page 264.

This was a *sci. fa.* on a bond given on obtaining an injunction. The defendants demurred on the ground that the act of 1810, c. 12, allowing a *sci. fa.* on such bonds was passed posterior to the bond in question.

RUFFIN, J. delivered the opinion of the Court.

This case is again brought here, upon the objection that the act of 1810, c. 12, does not extend to this bond, which was made before the passage of the act. Upon looking into the act, it is found to relate only to the remedy upon injunction bonds, which it is perfectly competent to alter from time to time as shall seem right to the Legislature—and the true construction of the act seems to us, to be that the obligee might sue by *sci. fa.* on all such bonds, whether executed after or before the passage of the law. The assembly only profess to regulate the mode of proceeding on the bond, which the act of 1800, c. 9, had before required to be taken: And we see no reason why the remedy should be different on one bond from what it is on another. Judgment for plaintiff on the Demurrer.

NOTE—See S. C. reported in 2 Murph. Rep 328.

CARPENTER *vs.* TAYLOR— Page 265.

If the plaintiff summon not more witnesses than the number allowed by law, and they are absent when the trial comes on, but the plaintiff nevertheless recovers, upon the plaintiff's affidavit that they were material and were expected by him at the trial, the defendant shall pay the costs of their former attendance.

The plaintiffs had a verdict in their favour. The defendant obtained a rule on them to shew cause why they should not pay the attendance of two of their witnesses who were absent at the trial of the cause. Upon the return of the *sci. fa.* one of the plaintiffs, who acted as agent for the others in the suit, made oath that those two witnesses were under subpœna and were material witnesses for the plaintiffs. One of them was to prove the length of time which plaintiffs had been in possession of the land, the other was to prove the boundary. One had removed from the State before the trial of said suit, and the other was absent for some cause not known to the plaintiffs, but were both expected at court, and that they had attended for several courts before the trial of this cause. The question for the opinion of the Supreme Court is, who shall pay the cost of these witnesses?

DANIEL J. delivered the opinion of the court:

The law allows a party to summon two witnesses to prove a fact, and directs that the party cast shall pay the costs. The plaintiff, in his affidavit, states, that the two witnesses who have taken out their tickets were material, one to prove possession, the other to prove the boundary. We do not consider the plaintiff liable to pay these witnesses, because he was able to go to trial without them, as they were not absent by his consent. Let the defendant, Taylor, pay the witness tickets and cost of this rule.

NOTE.—See *Venable* v *Martin*, 1 Car. L. Repos. 515.

MARGARET ARMSTRONG *vs.* SIMONTON'S ADMR'S—Page 266.

NOTE.—See S. C. reported in 2 Murph. Rep. 351.

EASON & WIFE *vs.* WESTBROOK AND GARLAND—Page 267.

NOTE.—See S. C. reported in 2 Murph. Rep. 329.

BOND *vs.* S. TURNER'S EX'RS—Page 269.

The court have a discretionary power of allowing executors and administrators five *per cent.* on the receipts and five *per cent*, on the disbursements; and though they may allow less, they cannot allow more. But executors and administrators cannot be allowed commissions on a debt due to them as executors of another person.

The executors in settling their account with the estate, had charged a commission of 5 per cent. on the amount of the receipts and expenditures; part of the expenditure was a debt paid to W. Turner's executors who were also the executors of T. Turner. The estate was worth only £3541 11 3¾, and the commissions allowed by the master in his report amounted to £319 5 5. The case was sent here on exceptions to the report for the preceding reasons.

DANIEL, J. delivered the opinion of the court.

The court has the power of allowing five per cent. commissions on the receipts, and five per cent. on the disbursements. The court has a discretionary power to allow less; but not more than five per cent.

The defendant, in this case; should not be allowed com-

missions on his own debt; the exception to the report for that reason must be allowed, and the Judge will use his discretion upon the other point.

NOTE—See *McAuslan* v *Green*, Conf. Rep. 33. *Hodges* v *Armstrong*, 3 Dev. Rep. 253. *Walton* v *Avery*, 2 Dev. & Bat. Eq. Rep. 405. See also this case, though not so fully reported, in 2 Murph, Rep. 331.

STATE *vs.* NEESE—Page 270.

If the libellous matter in a production be not direct, but only libellous by allusion or reference, the fact understood must be stated by introduction, and must be pointed at by explanatory inuendoes.

The defendant was found guilty by the jury, of a libel, the indictment for which was as follows:

The Jurors for the State, upon their oath present, that "Sampson Neese, late of the county of Orange, farmer, being a person of an envious, evil, and wicked mind, and of a most malicius disposition, and wickedly, maliciously and unlawfully minding, contriving and intending as much as in him lay to injure, oppress and aggrieve and vilify the good name, fame, credit and reputation of one Elizabeth B. Holt, spinster, a good, worthy, virtuous girl, and to bring her into great contempt, ridicule and disgrace; after the first day of August, in the year of our Lord one thousand eight hundred and seventeen, (to wit) on the tenth day of August in the same year, with force and arms in the county aforesaid, of his great hatred, malice and ill will towards the said Elizabeth B. Holt, wickedly, maliciously and unlawfully did write and cause to be written a certain scandulous, malicious and defamatory libel of and concerning the said Elizabeth B. Holt, which said false, scandulous, malicious and defamatory libel is according to the tenor following, to wit. "Notice to all Persons Jentlemen I have taken it upon myself to inform yo of A sircumstance that occird Latterly between

John Holts and Benjamin Whitbys as I was going on I discovered A man and woman along the field side and after standing a while I discovered that on was a Negro Seeing that they were so busily engaged I lit of and made toward them I got within About twenty yards of them and Behold it was Betsey Holt the daughter of Miss Holts (meaning the said Elizabeth B. Holt) and a Negro boy I Beleafe belonging to Mr. Whidbey I then Returned to my Beast, Jentlemen I assert this for the fact tho it is a Sircumstance that will evidently show for itself in a Coming time tho ther is A young man over the Alamance that would Witness this case he was Present with mea and he Beged mea to let no person for the sak of the Best of the family he having a great Respect for some of them I Beleafe formerly more so for hur than the Rest—I therefore will not assign my name Perhaps some of yo will say every person has their enemays and enmity speaks the trooth of no Person but this Surcumstance will show for itself and if not I am able to make it appeare." Which said scandalous, malicious and defamatory libel he the said Sampson Neese afterwards, to wit, on the same day and year aforesaid, on a tree on the side of the Public Road leading from Trolinger's Bridge to Hillsborough, in the county aforesaid, wickedly, maliciously and unlawfully did publish, nail up and fasten, to the great damage, disgrace, scandal and injury of the said Elizabeth B. Holt, to the evil and pernicious example of all other in the like case offending, and against the peace and dignity of the State.

SEAWELL, J. The question which arises in this case is, whether the libel stated in the indictment constitutes *per se* a libel? If it does, it being charged to be written *of and concerning Elizabeth Holt*, by the defendant, the State would be entitled to judgment; and it seems to me a very plain case.

Wherever the indictment charges the defendant with the writing or publishing of a libel of and concerning another, and the libel when set forth of *itself* contains clear, unambiguous, libellous matter—that is, something representing the person of whom written, in a disgraceful or ridiculous

manner, all other allegations, would be useless and cumbersome verbiage: But if the matter be only by way of *allusion*, or *reference*, or ironical, then although the whole world might put the same *construction* upon it; yet as this construction is by understanding something not *expressed*, this *fact* or *thing* so *understood*, must be stated in the indictment by way of introduction, and must be *pointed* at by explanatory inuendoes. The indictment in the present case contains nothing introductory by way of informing us, *what* it was the defendant *intended* should be *understood* that Elizabeth Holt had been guilty of, and consequently no inuendo if used could enlarge or in any manner qualify the import of the words of the libel. The libel itself represents that Elizabeth Holt was seen *busily engaged* with a negro boy; these words of *themselves* import no criminality, nor do they represent Elizabeth Holt in a ridiculous light, except by *understanding* them to mean something *not expressed*—and though the whole world *might* understand the writing to mean the same thing, yet before the defendant can be punished for the imputation *implied*, the *jury* must say that such *was* his meaning—when they have said so, *then* the court *judicially* knows it, and can proceed to inflict the punishment he so richly deserves; but the jury cannot take cognizance that such was the party's meaning unless it be averred so upon the record. This doctrine is fully stated by Chief Justice *De Grey* in the *King* v *Horne*.

I confess I had no doubt upon this case at the trial, as I then expressed, and only brought it to this court in deference to the opinion of the Solicitor General. There must be judgment for the defendant.

NOTE.—See *Watts* v *Greenlee*, 2 Dev. Rep. 115; *Brittain* v *Allen*, Ibid 120. S. C, 3 Dev. Rep. 167.

STATE *vs.* COFFEE—Page 272.

NOTE.—See S. C. reported in 2 Murph. Rep. 320.

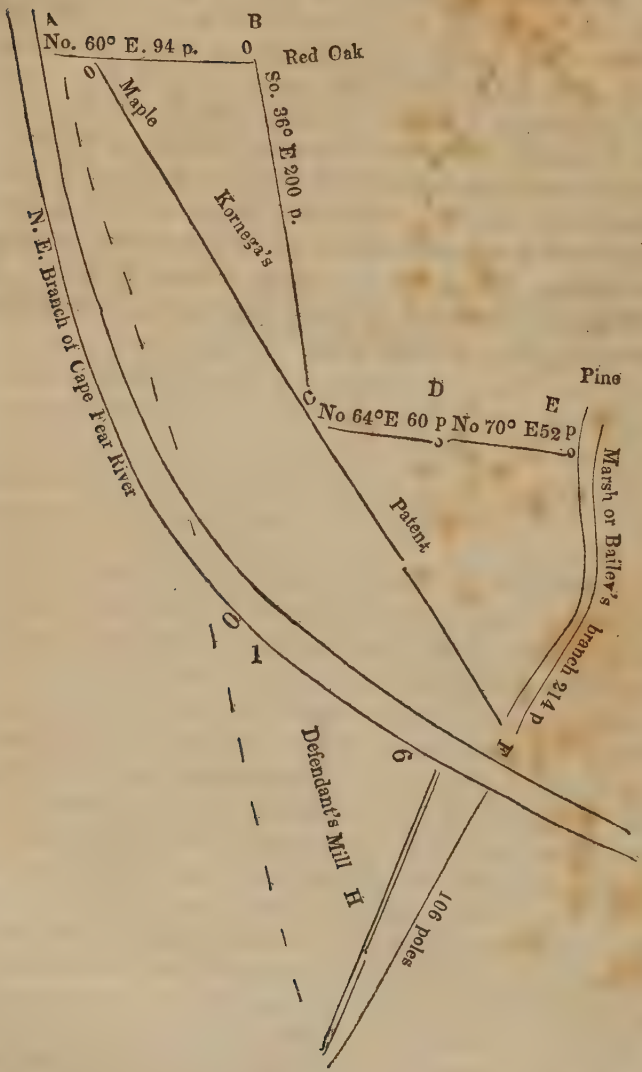
DEN ON DEM. OF CARROWAY AND WIFE *vs.* DANIEL WITHERINGTON—Page 275.

Where the patent described the land as lying on the north side of a river, and the line in dispute called for "a pine on the Marsh branch, then along the said branch 320 poles, thence to the beginning," and the branch meets the river at a shorter distance; *it was held* that the branch was the boundary, and the mouth of it, the corner of the land covered by the patent, and that the distance was to be disregarded.

This cause was tried before RUFFIN, J. at Sampson Superior Court, October, 1817, and a verdict found, under the charge of the court, for the defendant. The plaintiffs moved for a new trial upon the ground of misdirection by the Judge, which was refused; and the plaintiffs prayed for and obtained an appeal to the Supreme Court. The land in dispute is represented in the annexed diagram by the fig. 1, 6, and the letter G.; and is in the defendant's possession. The lessors of the plaintiff claim tittle under a patent to G. Kornega, in which the land is described, as "a tract containing 290 acres, lying on the north side of the north east branch of Cape Fear River, beginning at a Maple below Munse's ford, thence No. 60° E. 94 poles to a Red-oak; thence So. 36°, E. 200 poles; thence No. 63°, E. 60 poles; thence No. 70°, E. 52 poles to a Pine on the Marsh Branch; thence along said branch 320 poles; thence to the beginning." The beginning *Maple* is identified, and stands on the North side of the river at A. in the plat; and the several lines and corners to the *Pine*, inclusive, are also identified, and corres-

pond with the courses, distances and corners called for in the Grant, and are delineated in the plat by the lines A. B.; B. C.; C. D.; and D. E. The confluence of the river and Marsh branch is at F. and the distance, along the branch, between E. and F. is only 214 poles. From F. to G., crossing the river, is 106 poles; making with E. F. down the Marsh branch, 320 poles in the whole from E. to G. which is called for in the patent as the length of line from the pine. The line F. G. is not in the same course with the general direction of the *Marsh* branch, which has a winding irregular course. There are no marks between E. and F., or between F. and G. and no proof was offered of an actual survey of either of those lines.

DIAGRAM.


A
B
No. 60° E. 94 p.
Red Oak
Maple
So. 36° E 200 p.
Kornegay's
N. E. Branch of Cape Fear River
C
D
E
Pine
No 64°E 60 p
No 70° E52 p
Patent
Marsh or Bailey's branch 214 p
F
1
6
Defendant's Mill
H
106 poles

It was contended for the plaintiff, that the line from the pine at E. should be extended to G. so as to give the full distance of 320 poles, and to make G. A., the last line of the tract, and therewith include the defendant's possession at H. The presiding Judge instructed the jury, that inasmuch as the patent described the land to be "on the *north side* of the river," and after calling for the *pine* on the *Marsh* branch, gives a line running thence, "*along said branch*," (without any *course*) "320 poles," and no proof was given of an actual survey of those lines, the branch was the boundary, and the mouth of it, the corner of the land covered by the patent; and that no regard was to be paid to the distance in this case, consequently that the lessors of the plaintiff had no title to the lands in dispute, and the defendant was, in law, entitled to their verdict.

Regular conveyances from the patentee, Kornega, to the lessor of the plaintiff, were produced; and the defendant's grant issued after Kornega's. The question for the decision of the Supreme Court is, whether upon the foregoing statement and the construction of Kornega's patent, the direction given by the court to the jury was right or not? If right, then the rule for a new trial to be discharged; if wrong, the rule is to be made absolute.

Per Curiam. The court did right in telling the jury, that as the patent described the land to lie on the north side of the river, and after calling for a pine *on* the branch, gives the line *along* said branch, the distance was to be disregarded and the line stopped at the mouth of the branch. Let the rule for a new trial be discharged.

Note.—See the cases referred to in the note to *Bradford* v *Hill*, 1 Hay. Rep. 22, and also the cases referred to in the note to *Person* v *Roundtree*, 1 Martin's Rep. 18.

McRAINY'S EX'RS AND DEVISEES *vs.* CLARK AND WIFE.
Page 278.

The case was stated, and the opinion of the court delivered by RUFFIN, J. as follows:

M'Rainy made his will, whereby he devised his tract of land to some of the plaintiffs and appointed the others his executors, who now offer the will for probate, M'Rainy being since dead. The defendants, Clark and wife, the latter of whom is one of the heirs at law and next of kin of M'Rainy, opposed the probate, whereupon this issue of *devisavit vel non* was made up; and the question turns upon the fact, whether or not there was a revocation of this will? For the purpose of proving that there was, the defendants offered in evidence the declarations of one of the executors and some of the devisees who are parties to this issue. But the court refused to receive the evidence. They then proved, that after the making of the will, M'Rainy contracted to sell a tract of land (being part of the estates devised in the will) for a price agreed upon, and was to convey on a particular day; but he died before the day arrived, and did not convey. And they insist that the contract was a revocation in law. The court instructed the jury otherwise, and they found that M'Rainy did devise, &c. A motion is made for a new trial upon the ground that the court erred in both of the above points.

Upon the latter, it seems entirely clear that the court informed the jury correctly. What may be the effect of such a contract in Equity upon the particular devise of the land sold, is another question. The devisee may, or may not, be a trustee for the purchaser, according to circumstances; and the price of the land may, or may not, be a part of his personal estate for the benefit of his residuary legatee or next of kin, also according to circumstances. But we have nothing to do with either of these questions, now. The point in dispute is, whether there be a *revocation of the will* at

law; and that there is not, is proved beyond a doubt by many authorities. *Ryder* v *Wager*, 2 P. Will. 332. *Cotter* v *Sayer*, ib. 23. Even if the lands had been actually conveyed, the will would not have been thereby *revoked*, properly speaking, so as to prevent its probate; but the only effect would be an ademption of the devise of the particular lands conveyed. Upon the point of evidence, however, I think with the defendants. This issue is in the nature of a suit, and the executors and devisees are regularly parties to it. Their declarations ought to be received in evidence against themselves. I cannot see a legal ground to reject them. We cannot, in a Court of Law, look to the interests of third persons not before us. We cannot here know the executor as a trustee. All we can know is, that he is before us as *a party to the suit*. The rule is universal, that whatever a party says or does, shall be evidence against him, to be left to the jury. It is competent evidence. The jury can and will give it its due weight, according to the manner of obtaining the confession or the relative interests of him whose admissions are proved. I know of no solitary exception to this rule, and cannot imagine one. I think, therefore, that there must be a new trial.

NOTE.—See S. C. reported in 2 Murph. Rep. 317 under the name of *Archibald McCraine's Heirs and Devisees* vs. *Neil Clark and Catharine his wife*.

CATHARINE HENRIETTA HASLEN *vs.* EDWARD KEAN'S HEIRS AND ADMINISTRATORS—Page 279.

Where a power is created by a deed, authorising a husband to appoint to whom land shall be conveyed, and, in case of his death before his wife, authorising her to do it, there must be not merely an intention in the husband to appoint, but an actual appointment, in the precise form required by the power, before the wife's right of appointment is defeated. Therefore where a power requires, among other requisites, that the trustee should convey to such person as the husband should limit or appoint, and the husband executes afterwards an instrument of writing, authorising the trustee to convey to whom he pleases in his discretion, this is not an execution of the power, nor a destruction of that subsequently limited to the wife.

Wilson Blount conveyed two tracts of land to Edward Kean, by a deed bearing date the 25th February, 1799, "upon trust that the said Edward Kean, his executors, administrators or assigns, shall and will at any time, at the request of John Haslen, Esq. of the colony of Demarara, in South America, or at the request of Catharine Henrietta Haslen, in case she should survive him, or in case both should die without making such request, then at the request of the executors or administrators of the survivor of them by good and sufficient deeds, such as the counsel of the said John or Catharine his wife, or the executors or administrators as aforesaid shall advise, convey in fee simple the said several tracts or parcels of land, &c. unto such person and persons qualified to acqurie, hold and transfer lands and other real estate in the State of North Carolina, as the said John Haslen during his life or Catharine H. his wife, after his death, in case she should survive, or the executors or administrators of the survivor of them, by writing signed in the presence of one or more credible witnesses, or by last will and testament duly executed shall direct, limit or appoint."

On the 5th April in the same year John Haslen executed the following instrument of writing, in the presence of one credible witness. "Whereas by a deed of bargain and sale bearing date the 25th of February, 1799, between Wilson

Blount and Ann his wife, of the one part, and Edward Kean of the other part, two several tracts of land containing about eight hundred acres with the buildings and improvements thereon, lying in Craven county, were conveyed to the said Edward Kean, &c. And whereas also I, the said John Haslen, intend shortly to undertake a voyage to the colony of Demarara in South America, and am apprehensive of the dangers to which my life will be exposed in the said voyage; now therefore know all men by these presents, that in consideration and in execution of the above power of appointment to be reserved to me, I do hereby direct, limit and appoint that the land above recited and referred to, may and shall be conveyed, sold and aliened by the said Edward Kean at his discretion to any person or persons qualified to acquire, transfer and hold lands in the State of North Carlina."

John Haslen went to Demarara, and died in March, 1804; and Edward Kean died in August of the same year, neither of them having done any thing further towards the execution of the power.

Catharine H Haslen, the widow of John, executed soon after his death, a deed, in the presence of two credible witnesses, whereby she directed the land to be conveyed to herself; previous to which she had become naturalized in a court of record of the United States, of which she produced authentic testimonials.

Browne, for the defendant.

The construction of powers as to their creation, &c. is the same at law as in equity, and according to the substantal intention and purpose of the parties. Doug. 293. *Ren* v *Bulkely*, 2 Bur. 1146, 4 T. R. 748. *Griffith* v *Harrison*, 3 T. R. 674, *Pomery* v *Partington*.

If the clause "qualified—Carolina" is omitted, then it gives Haslen a general power of appointing *ad libitum;* But if this clause had not been inserted, an alien appointed, could not have compelled an execution of the trust. Dyer 2, c. 8. Co. Lit. 129, b. Com. Dig. Abatement, E. 4. Alien, c. 4, 5.

This clause was inserted solely to prevent Kean being obliged to convey to a alien, which he would not, if it had not been inserted, and *Expresio eorum quæ tacite insunt nihil operatur.*

Such a clause even if it had any operation would still leave the power a fee-simple conditional. Lit. 360, 1 and Coke's Comment.

There is this difference between conveyances to an alien which pass to him the legal possession, and those which must be enforced only by suit: In the first instance, he takes for the benefit of the king; in the latter, he takes not at all, because he cannot support any suit for real property.

It is however, absolutely necessary for the complainant to maintain that the power gave her an absolute power in fee-simple, over the estate *for her own benefit;* for she hath appointed that it shall be conveyed *to herself.*

As the question before the court does not relate to the *suspension* or *extinction* of the power, it is unnecessary to enter into the doctrine of powers *collateral* to the land, and *relating* to the land. This however, was a power *relating* to the land, and might have been released by *Haslen*, being for his benefit. Co. Lit 265 b, Ib. 342, 3, n. 1. Albanie Case, 1 Rep. 110, Ib. 173, Dygges Case, Pow. 8, 9.

If one has a power to dispose of personal or real estate as he pleases, he is in equity considered as the owner. This is called a *general* power, 6. 2 Vern. 465, and *Lapells & als. v Cornwallis.* 1 Atk. 465, *Hinton* v *Toye*, 2 Atk. 172, *Bainton* v *Warde*, 3 Atk. 656, *Troughton* v *Troughton*, 1 Ves. 9, 10.

A *qualified power*, is where the appointees are named and then it is considered as the property of the appointees, and the appointer only, as a trustee, and if no appointment, or an illusory one is made, it will be divided equally. 2 Ves. 643, 2 Br. ch. 38, 1 T. R. 435, N. 1 Ver. 66, 1 Br. ch. 450, 4 Ves. jr. 1708 & 5 Ves. jr. 495, *Brown* v *Higgs*, 5 Ves. jr. 849, *Kemp* v *Kemp.*

Such powers are trusts distinct. See 1 P. W. 157.

Where the person executing the power parts with a kind

of dominion he has over the estate, as here, his execution shall be construed liberally; but a naked power always strictly. This is nothing more than that the will of the giver shall be observed. 2 Ves. 79. Doug. 293, 2 Bur. 1146.

All the cases of naked powers to dispose of to two or more, and the court in declaring the execution of such powers void, were perhaps influenced by the maxim, "Equality is Equity," and the maker of the power having shewn no preference among the appointees.

All powers enforced in equity as trusts.

As to the execution of the power by Haslen.

Kean by the deed from Blount had the power of transmitting it by descent, and the deed from Haslen gave him the power of selling and conveying at his discretion.

All the interest that Haslen had in these lands was derived from the clause is the deed from Blount, binding Kean to to convey at his (Haslen's) discretion. Haslen, by the deed of Feb. 25, 1799, appoints Kean to convey at his (Kean's) discretion. The import of the expressions is the same in the one deed as in the other: and if the one deed does not convey from Haslen to Kean, the same interest which the other conveyed from Blount to Haslen, it is very odd, and a plain man must be as much surprised at it as my Uncle Toby was, when he was informed that all the common lawyers and civilians, were unanimously of opinion that the Dutchess of Suffolk was not of kin to her son.

Whenever it appears that the person having a power, has done an act with the intention of executing that power, it will be a good execution of the power in equity—although the deed does not recite or refer to the power—althought it is an improper one for the purpose, and purports to convey as owner; and although a considerable part of it must be rejected, in order to enable the court to construe it an appointment: And it will be sufficient evidence of the intention to execute. If the party could not do the act validly, but in virtue of the powers; or if the power is recited or referred unto. Doug. 293. Bur. 1146. Powell on Powers, 111, 321. Com. Dig. Poias. C. 1, 5, Uses. L. 4, 5. Tomlin-

son v Deighton, 1, P. W. 157. 10 Ves. jr. 258. 1 Atk. 441. 3 Br. Ch. 230.

The deed of Feb. 25, 1799, recites the power as the foundation and support of what he was about to do. His being about to undertake a sea-voyage, in which he apprehended his life would be exposed to danger, and where he would be without the proper assistance or witnesses to enable him to execute his power as the causes of what he was about to do.

A power of attorney would not have answered his purposes, (and he knew it; for every one is presumed to know the law, even to subject them to penalties and punishment) as his death would have revoked it. Then "in execution of the power." &c. We contend this was an execution of the power; they say it was not: What does he himself say? What does Lord *Hardwicke* say? 1 Atk. 441. And what do they say? When they dispute the fact or intention, Mr. Haslen contradicts them:—When they dispute the law, Lord Hardwicke contradicts them.

"I the said John Haslen," &c. Haslen certainly intended to do something in execution of his power. They tell us, as a Power of Attorney it is void for want of Haslen having an authority to delegate; and that as an appointment of the interest, it cannot operate on account of the words, "shall be conveyed, &c." If this doctrine was correct, the court would be warranted by the case of *Tomlinson* v *Deighton*, in rejecting these words, and reading it as a plain appointment.

But we contend there is no necessity for this. This clause gives him ample power to sell and convey at his discretion, the words "to any person," &c. operating nothing as I have already shewn.

I will just add. If lands are devised to one to dispose of at will and pleasure, that gives a fee to the devisee. Com. Dig. Ddvise, N. 4. 2, Wils 6. 1, P. W. 151.

Now in wills the intent of the testator to give governs, and here the intent to execute governs. 1 Salk. 186, N. 3

Br. Ch. 230, 1 Atk. 441. Very like the present case, is *Hinton & als.* v *Toye.* 1 Atk. 465.

Kean had the possession, the legal fee-simple, and the equitable fee-simple, all united in him, and what more did he want—he had a right to direct a conveyance to himself. "I Kean limits and appoints that I Kean shall convey to I Kean." 1. Br. Ch. 364. Trust—privity in estate, and confidence in the person. Doug. 771. 3 Ves. jr. 339.

A devise of any thing to be at the disposal of A. by his last will and testament, gives a fee to A. 2 Vern. 181. *Robinson* v *Durgale*, 1 P. W. 149, 152, 171, *Tomlinson* v *Deighton* 1, Amblor 750, Maskelyne *v* Maskelyne. 2 Ves. jr. 589, 594, *Standen* v *Standen*, 3 Ves. jr. 470, *Langham* v *Nenny*, 2 Wils. 6, *Pearson* v *Otway.*

If money is directed to be turned into land or land into money, for the benefit of any one, he may elect to have the thing without its being turned. 1 P. W. 389, 470, 130. 3 Atk. 447, 580. Amb. 229.

All powers enforced in equity as trusts.

It is universally true that where the legal and equitable estates meet in the same person, the equitable merges in the legal without act done. 1 Br. Chan. 364, *Wade* v *Paget.*

Vincent & White, 15 East 173. and *Larmer* v *Learle*, 2 Wils. 29, are cases of successive not concurrent or co-existing estates.

Gaston, for the complainant.

To decide the first question correctly, it is proper to enquire, 1st, what control has been given to the complainant over the land in question by the deed of Blount? and, 2dly, How is that control effected by Haslen's deed of 5th of April, 1799?

1st. Blount's deed is a bargain and sale, by which, in consideration of value received from Kean, he conveys to him the fee simple of the land. No interest of any kind is reserved to the bargainor. The entire legal estate passes to the bargainee, because the consideration necessarily raises an use for the bargainee which the statute of uses executes, and none other can be executed by the statute. Cruise Title 12.

(Trust) ch. 1. § 11. 2 Bl. Com. 335 Besides this use to the bargainee, one other is expressed for the benefit of an unknown person, and on the happening of a future contingency, that is to say an use for such person as John Haslen in his lifetime may direct Kean to convey the land to, or if John should not give such direction, as Mrs. Haslen, the complainant, may direct. Uutil such a direction given to Kean, he takes the entire estate both legal and equitable. when such a namination is made, there is a trust declared that Kean shall convey accordingly. Kean therefore takes the entire legal and equitable estate, subject however to a contingent trust for the benefit of an unknown person, which trust is to be called into action by the execution of a power vested in John Haslen for life, and after his death in the complainant—not a contingent use which the statute will execute as soon as it is raised, but a trust which a court of Equity will carry into execution. See Saunders on Uses and Trusts 218 315. This trust is similar to a like use on a feoffment at common law. Powell on Powers 4-6. John Haslen, and after his death Catharine Haslen, the complainant, take nothing in the land by virtue of this deed. The only connection between them or either of them, and the land itself, or the enjoyment of the land, is through the medium of their power, by which they can call into action this sleeping trust. It follows then, that according to every definition of legal writers, their power is one "simply collateral." Saunders 219, 220 226 Powell on Powers, 8, 9, 10. 11, 12. Cruise Title 32 (Deed) ch. 15, § 3 to 9. & § 22. Co. Lit. Butler's note 342, b. This Power bears a resemblance to ownership in its almost unlimited ability to direct alienation. In this respect, it is as unlimited as ownership, except that the alienee is required to be a person having a capacity to hold real estate, whereas an owner may convey to one not having such a capacity, and under such a conveyance the alienee shall take though he may not hold the land. From this extensive control over alienation, it may deserve to be called a general power. But it is utterly dissimilar from ownership in this respect, that it carries with it no right

whatever to use or enjoyment, and on this account it is simply collateral to the land. Its entire character is that of a "general collateral power of appointment" in John Haslen for l fe, and after his death in the complainant Catharine Henrietta Haslen, his widow. Powell 8 & 9.

2dly. How is the right of control in the complainant over the land conveyed by Blount affected by the deed of the 5th of April, 1799?

The foundation of the argument for the defendant is in the supposition that this deed was designed as a beneficial appointment in favor of Kean. This is utterly denied. On the contrary, the complainant contends it is irresistibly evident that this deed was not intended to operate in itself as an appointment. The recital shews that Haslen knew what was his power, and states it to be that of naming a person to whom a conveyance should be made. If by this deed such a power was meant to be finally executed, we should expect to see terms used corresponding with the nature of the power recited. The racital states the reason or motive for the act he is about to perform, and that is, because he is about to undertake a long and hazardous voyage, and may never return. This has no assignable connection with a beneficial appointment in favor of Kean, and is a strange introduction to such an act. If the great end were the selection of Kean as the object of his bounty, it would have been natural to assign a reason for this preference, rather than for the execution of the deed at that time. The contemplated voyage and the doubt of retnrning, may be very sufficient reasons for leaving with some person an authority to do an act which he wished done in his lifetime but might be prevented from doing personally; and as Kean remained behind although Haslen went away, he was a fit person to be clothed with such authority, and might have numerous opportunities of doing what Haslen desired to be done. Nor is this view shaken by the words "in execution of the power." These were natural and proper whether Haslen intended an appointment ipso facto or a mere authorization to appoint, as in either alternative having no interest in the

land his only claim to act was "in execution of the power." The operative words of the deed are unquestionably not words of appointment. They direct that instead of the conveyance being made to a person at Haslen's discretion, they shall be made to one of Kean's selection. Had the name of any other than Kean been here used, it could not have been pretended to be an appointment to him—it would have been clearly but a substitution of such person in lieu of Haslen to exercise the power. The words must retain their natural meaning although the owner of the legal estate be chosen as the substitute of the donee of the power. Besides it is imaginable, if this instrument were designed as an assurance of title to a valuable estate, that such carelessness of manner and laxity of phrase would have occurred? Would there not have been some words of conveyance—or release—or discharge—some declaration that Kean might enjoy uncontroled by the power—or something manifesting beyond a question Kean was to be benefitted by it? It is probable, on that supposition, that this all-important instrument would have remained unknown until after Kean's death and the present claim preferred, and then only brought for registration and publicity? Viewing the instrument as intending a substitution of Kean to act for Haslen, and every part of it becomes consistent with the rest and with the conduct of the parties. The recital shews that Haslen had a power which, under the form of ordering the owner to convey did in part enable him to sell the land; that he was about to go to sea on a perilous voyage, before he could make such sale, and that Kean remained behind who might have numerous opportunities to sell, and was worthy of all his confidence. Then the deed proceeds, that in execution of this power he authorises Kean to make such a sale, and delegates to Kean, for this purpose, all the authority he himself possessed. In performing such an act, Haslen shewed great reliance on Kean's probity, but this was a reliance proved to be well placed. Kean met with no advantageous opportunity to sell, and therefore did nothing under the instrument, did not even give it publicity. But his representatives, far less scrupulous, in

whose probity Haslen did not trust, and who are therefore unable to do what Kean disdained, *to make an appointment in favor of themselves*, allege Kean's inability to perform such an act by means of a conveyance to a third person and reconveyance to himself as equivalent to a performance, and ask a Court of Equity to presume such an act of iniquity done, as an excuse for their refusing to execute the confidence which has devolved on them! If there be a doubt of the design ot Haslen in this deed, that doubt operates against the defendants. The complainant's power of appointment is as express and complete as John Haslen's and is not to be annulled by any thing short of an unambiguous exercise of his.

Considering the deed as a mere substitution of Kean for Haslen, it will not be denied that it became defunct by the death of Haslen, no act being previously done under it by Kean. A delegation of power (unless acted on) dies with either of the parties. Little on sect. 66 Co. Lit. 52, b. A claimant under a power must claim according to the legal operation of the instrument by which the power is executed. 2 Vesey 72 to 77. The estate in the land never having been changed since the conveyance of Blount—the dormant trust never having been wakened during the life of Haslen, there is no impediment to prevent the complainant from calling it forth, nor any excuse for refusing to obey this call. Nothing less than an appointment actually executed could avail as an objection. Ex parte George Caswell, 1 Atk. 559.

It is contended by the defendants, that the deed of the 5th of April operated as a *release* from Haslen to Kean of his power of appointment. This would be to assign to it a construction which it not only does not warrant, but which is forbidden by its terms. There is not one word from which a design can be fairly inferred of an intention to release or forego the power; but there is unequivocal evidence of a design to *execute* the power, and of appointing a proxy to execute it because of the difficulties in the way of personal execution. But suppose Haslen did release his power—

By a release nothing passeth but what the *releasor* hath at the time of the release. Littleton Sect. 443. Where is the authority or the reason to be found to justify the position that a release can discharge the right or power of one not claiming either by, from or under the release? The existence or non-existence of Haslen's power is utterly immaterial as it regards the power of the complainant; except that its annihilation secures the better against the possibility of being defeated by an appointment under it. But in fact Haslen's power could not be released. A power however extensive, if uncoupled with an interest cannot be released. Powell 15, Saunders 219, Co. Lit. 265, b. The defendant's counsel aware of this, have resorted to much learning to prove that a general power of appointment is always coupled with an interest—is in fact tantamount to the actual ownership, and therefore may be released. This might be admitted without injury to the cause of the complainant, for it leaves in full operation objections to the supposed appointment by virtue of the deed of the 5th April that are irresistible. Suppose such a power might be released, it does not thence follow that this deed intended an appointment to Kean—nor that the deed has in it words of release—nor that a release can extinguish a power not belonging to the releasor, nor dependant on his. It would seem therefore rather a matter of curiosity than profit to examine this doctrine, that a general power of appointment is necessarily an interest, and cannot be collateral. But how is it supported? Great reliance is placed on a note of Butler's to Coke Littleton 271 b. If that note be examined with attention, it will be seen that the annotator is illustrating the relation which the instrument executing bears to the instrument creating the power—that he shews this relation is not a relation of time—and thence infers that by the execution of a general power of appointment an estate may be limited to a person who could not have taken under the deed creating the power. He thinks this property belongs to general, as contradistinguished from special powers, because the former have not a tendency to a perpetuity, and in this respect re-

semble absolute ownership. See the note from p. 3, § 4. The correctness of this distinction is questioned by Powell, who assigns for his doubt a reason not readily answered, viz. that until the power be executed, alienation is as much suspended in the case of a general as of a special power. See powell's note to 2d Fearne. 375 to 379. But whether Butler be correct or not in the distinction which he has taken between a general and special power of appointment, it would be doing him palpable injustice to quote him as authority for the position that a general power cannot be collateral. Until a resemblance in one important circumstance can be confounded with absolute identity, until the old maxim "*nullum simile est idem*" be reversed, the similarity between a general power and absolute ownership in the control over alienation, will neither make the first an interest, nor the second, a mere power. With a similarity in this respect, there is an infinite dissimilarity in another respect. Ownership carries with it the right to receive the issues and profits. Power may be wholly unconnected with such a right. Indeed Butler has expressly negatived this doctrine. In the note to 342 b. he adopts and sanctions the principles laid down by Powell in his Essay on Powers, who states *totidem verbis* there may be a general power of appointment simply collateral and without an interest. Page 9. My Lord *Coke* gives as an instance of such a power, a devisee that executors shall sell lands. Co. Lit. 265, b. And in the case *Exparte Caswell* before quoted, it was judicially decided such a power was not an interest to pass in a will under a residuary devise. The cases of *Hinton* v *Toye*, 1 Atk. 464, and of *Tomlinson* v *Deighton*, 1 P. Wm. 15, have been pressed into the service to uphold this discovery that a general power never can be simply collateral. These cases prove only that a devise to use and sell, or to be disposed of as the devisee pleases—is usually construed as a devise of the entire estate. The object in the construction of wills is to effectuate the intention of testators who are not usually exact in employing technical and appropriate terms. When from their words you can fairly collect a design that the

devisee shall hold and dispose of the thing given at his pleasure, it is very correct to infer that the thing was designed to be given in absolute ownership. Of the case of Baynton and Ward, 2 Atk. 172, it has been very properly remarked, in *Holmes* v *Coghill*, 7 Ves. jr. 499, that it is inaccurately reported. The report is in fact but a short and imperfect note, which does not even set forth the nature of the property over which the power was given. If it were over the personal estate of his wife—and the marginal note calls it *his* property, and the last remark in the case assimilates it to a power which a man has to dispose by appointment of a reversion to himself in fee—it is clearly without application to the point under discussion. If the power were over her real estate, then the decision in it brings the case within the range of *Lascelles* v *Cornwallis* and *Townshend* v *Windham*. These cases, and others that have been quoted, establish the principle, that when a man has a general power of appointment, *which he may execute in favor of himself*, and he executes such power in favor of a mere volunteer, a Court of Equity may interpose and render such an appointment primarily subject to the payment of the appointer's debts. Does this prove that such power is *in itself* an interest? No—we have seen it will not pass under a devise of the residue of testator's estate. *Ex parte*, Caswell, 1 Atk. 559. If the power be not executed, if an appointment be not actually made, a Court of Equity cannot act on the power even in favor of creditors. 1 Fonblanque, 276, 326. *Holmes* v *Coghill*, 7 Ves. jr. 499. The power itself is not an interest—but when an *appointment* is made in favor of a volunteer, a Court of Equity treats it as though it had been first made in favor of the debtor himself, and then given over to the volunteer. In such a case, when by executing the power, he gains an interest to himself and attempts to pass it away to others in fraud of his creditors, a Court of Equity, in the language of Lord *Hardwicke*, *Townsend* v *Windham*, 2 Ves. 11, will arrest it in transitu, and apply it to the discharge of his debts. It is superfluous to shew the want of application of this principle to the point

in discussion. Here there is no creditor—there is no execution of the power—nay more, it could not have been executed in favor of Haslen. It could have been executed only in favor of one qualified to hold real estate, and he was an alien. His description in Blount's deed is "John Haslen of Demarara, Esq."

It has also been contended by the counsel for the defendants, that by the deed of the 5th of April, Haslen's power became annexed to Kean's estate—by such annexation the power merged in the estate—and this merger operated as an appointment under the power by Kean and a re-conveyance to Kean by the appointee. To this, various answers may be given. The power could not be annexed to the estate in Kean's hands, for the power was not in its nature assignable. No power, whether connected with an interest or merely collateral, can be assigned unless it was made assignable at at its creation. Cruise Title 32 Deed c. 16, § 55, 56, 57, 58. Powell on Powers 372, 3, 4. 2 Vesey 643. If it be connected with an interest it may indeed be released, and the consequence of a release will be, as we have seen, the extinction of the power of the releasor only. It may be further answered, to the refined and far fetched reasoning which is now under examination, that there is no analogy between the union of a power to an estate, and the merger of an equitable in a legal interest. Nothing is better settled than that the proprietor of the fee may, beside his estate, have a distinct and independent power of appointment. This is the case when a conveyance is made to such uses as A. shall appoint, and until and for want of such appointment to him and his heirs. See *Maundrell* v *Maundrell*, 10 Vesr jr. 263 to 266. Co. Lit. note 216.

There is, therefore, no incongruity in permitting Kean to add to the estate, he already proposed, a power of appointment during the life of Haslen. Whether this power remained with Haslen, or was transferred to Kean, the power of Mrs. Haslen remained precisely the same. But supposing such an analogy to exist—equitable estates merge in le-

gal estates not when the equitable estate is *partial*, and the legal estate *entire;* for that might work inconvenience and injustice, but only when the two estates are exactly co-extensive; and the effect of such a merger is, that the equitable estate then ceases to exist. Philips v Brydges; 1 Ves. jr. 1256. Applying this supposed analogy, we might do injustice to Kean, to merge the partial power of appointment for the life of Haslen in Kean's fee; but if it must be merged, and thus cease to exist—Mrs. Haslen's power remains in full life. The drowning of the one carries not destruction to the other—on the contrary it ensures to that other, an opportunity for action.

An attempt has been made to invoke the aid of the Court to supply what is termed the defective appointment under the deed of the 5th April. Even were it a defective appointment, it cannot claim such aid. Equity only helps a defective execution of a power, where there is a consideration or fraud or accident. Cruise Title 32, Deed, ch. 19. But the enquiry is not whether there has been a defective or perfect appointment, but whether there has been any appointment, and equity never supplies the non-execution of a power. Powell on Powers 157. Cruise Supra § 14.

On the second and third questions referred to the court nothing has been said by the defendant's counsel. They are too plain to require or admit an argument. The grant of the rights of naturalization, like the appointment of an administrator or the probate of a will, must be recognized a valid until it be annulled; *Allen* v *Dundas*, 3 Term 132. Nor can it be competent for either party to explain the meaning of the deed of the 5th of April, by evidence dehors. Authorities analogous to this position are to be found in 1 P. Williams 79, (2 point in *Bumfield* v *Capham*,) 4 Rep. 4, 5. Powell, on Devises, 480, 481, 482—1 Salk. 231—2 Vernon 233.

Seawell, J. It seems to me that this case lies within a narrow compass; and that the whole question settles down into this enquiry; whether the husband by the deed to Kean *completely* and in due form executed this power? If so

did, there is an end to the wife's power; if he did not, she is entitled to appoint. The present controversy is between pure volunteers without any kind of consideration on either side; and the wife is entitled, unless there has been, not only an *intention* to appoint, but an *actual* appointment, and that in the *precise* form required by the power. This provision is proven by many authorities, *Dormer* v *Thurland*, in 2 P. Williams, *Ross* v *Ewen*, in 3 Atk., *Darlington* v *Pulteney*, in Cowp.; Powell on Powers, 150, 163, and many others there cited are directly to that point.

This makes it necessary to enquire in what manner Blount, the donor of this power, declared it should be exercised so as to defeat the right of the wife; he requires it should be by *deed* executed in the presence of *witnesses*, and that by this deed, Haslen, the husband, should *limit* and *appoint* to *whom* Kean should convey, provided such person should be qualified to take, hold, and transfer lands in North Carolina; then the first question is, has the husband *appointed*, and in the manner prescribed? that brings us to the deed by the husband to Kean. Does that appoint to *whom* Kean shall convey? No, it authorises Kean to convey to whom *he* pleases in his discretion. This is a confidence which Blount did not think proper to confer on Kean, nor does he vest Haslen with such a power. It may be said, however, that Haslen took a beneficial interest under the power; for, as he might appoint whom he pleased, he could consequently appoint himself. That will depend upon a fact which does not appear in this case, namely, whether he was *qualified* to take, hold and transfer land, in North Carolina; if he *was*. then he had a beneficial interest; but it is indispensible for those who claim the execution of the power, to shew every circumstance necessary therefor.

But *assuming* it as a fact that the husband *was* qualified aad *could* appoint himself, and that having a beneficial interest, could delegate this power, has Haslen exercised it? He has not. But then it is said, having already the legal estate, with Haslen's power, *he* might appoint himself. Does Haslen's deed say so? It only authorises him to bargain,

sell, alien and convey to any persons in his *discretion*, who would be qualified to take, hold and transfer lands in North Carolina: in substance, the deed is, that Haslen *authorises* him to sell to *any* person, being, as the deed declares, "about to take a voyage to South America," when, as the purchaser was to be *looked* for, it was not in the nature of things that Haslen could be present to appoint *him*. And though Haslen declares in the deed that he transfers that authority in *execution of the power*, it is only by *reference* to his power, and is tantamount to saying "in *virtue* of his power." It seems to me utterly impossible to read this deed, and collect any thing like the remotest intention in Haslen to effect any other object than a bare *substitution*. There is nothing in the deed which even *implies* that Haslen had surrendered or released to Kean the right of appointing; nor can I think there was any thing in the deed which prevented Haslen from revoking it the next moment. The substitute then must necessarily stand in the shoes of his *principal*, and until he *had* bargained, and sold the lands, as he was intrusted in his discretion to do, the power of the wife remained undefeated. To consider this deed as an execution of the power, and consequently a destruction of the power limited to the wife, could only be by a *presumption* very far-fetched; which I think we are not warranted in doing, in favor of a stranger and pure volunteer; especially, when, by so doing, we are defeating the wife, who was an object of the donor's bounty. I say the *donor's*, for if it was the *husband's* bounty, she has still a stronger claim. And according to the light I have considered this case in, it seems to me that no release, or other act of the husband, *save the appointment*, either by himself or substitute, (if he had a right to delegate his power) could defeat the power of the wife; though he might expressly have declared it in the extinction of the wife's power; when I say "*appointment*," I wish to be understood that in favor of purchasers, Courts of Equity, on account of the consideration, will effectuate them, wherever defective, and will consider as *done*, what the parties have

agreed to do; but it comes to the same thing at last, and is an appointment in *equity*.

The result of the whole seems to be, that by this deed, if it operated at all, the power of the wife was placed at the mercy of Kean, instead of the husband; and that thereby he acquired the *power*, and nothing more, of defeating by his *own* act the claim of the wife, which before he could not; but that in both cases it required the *exercise* of this power. The consequence is, that the wife having become qualified to take, hold and transfer lands in North Carolina, and having appointed herself, the heirs of Kean, who hold the legal estate, must convey to her. This case has been a subject of tedious litigation, and I have bestowed upon it all the attention which my time and situation would admit of; and it very possibly may be, that through my errors and those of my brethren, who think with me, injustice is done the defendants by this determination; and I ought the more to distrust my own opinion, as it is not in accordance with that of one older in the profession than myself: but being placed here for the purpose of deciding, it is my duty to do so in the best manner I am able. Many points were made in this case upon the difference in powers and the effect of a release; but from the view I have taken of it, they have become unnecessary to be examined, considering the *manifest* intention of the deed, to be only a substitution of power. But if it were necessary, I should hold, that as those who claim an execution of the power must shew it, they must, of consequence, shew themselves qualified to be appointed. Aliens can take, so can they transfer, but they cannot *hold* lands; that, therefore, it does not appear the husband had any beneficial interest; if he had not, that it was then a mere *personal* confidence, which could not be delegated. And as to a release, that of course would have no effect if he had no interest to give up: but even if he *had* an interest, as the power of the wife was limited to her by the original donor, to be exercised in default of the appointment of the husband, that both being strangers, and upon an equal footing, the husband, by a release, could only relinquish to

the *legal* owner what he had, and that the only effect would be, to lop off one power, in like manner as if it was spent by death; for Blount, who created both powers, and who, as the case appears, is to be considered the benefactor of both, has appointed Kean to hold the estate, subject to the appointment of the wife, in default of any *appointment* by the husband; and as the release could only *destroy* what the husband had, as between volunteers; it consequently gave Kean nothing but a *dead* power; it gave him no ground in equity to oppose the wife's claim; for that must be founded either in *regular* title, according to the prescribed form; or it must be founded upon *moral obligation*, which in equity dispenses with form. So long, therefore, as Kean continued to hold the lands, without any appointment being made by the husband, does the power of the wife remain alive.

I readily admit the execution of a power limited to strangers, is to be fairly construed, and this I understand the books to mean when they say "liberally" construed, and that they are to be supported if there appears an intention, and the manner employed is within the fair and liberal exposition of that prescribed by the donor; and had the husband clearly evinced such intention by limiting in this deed that Kean should have, hold and enjoy the estate, or words to that effect, that such appointment would have been sufficiently formal, and would have enabled him to have resisted the wife's power. But that, according to the clear design of the parties, he stood in no other condition than one with a general power of attorney to sell the lands in question to any person in his discretion, except such as could not hold them according to the laws of North Carolina.

Ruffin, J. and Daniel, J. concurred.

Hall, J. It is said in Powell on Powers, page 8, "That powers simply collateral, are when a person is invested with a capacity of disposing of an interest in, or of destroying an interest in uses and trusts, in which he hath not, nor ever had any estate, first of creating such estate, as where *cestui que use* devised that his feoffees should sell his lands and died. Here the power to sell was merely collateral to the

right of the land, for the feoffees take thereby no interest in he land, but are barely empowered to sell."

"Secondly, of destroying such estates, as if there be a feoffment in fee by A., to divers uses, with power that if B. shall revoke them, the uses shall cease, for B. has no interest in the estate subjected to his power, nor can gain any by revoking or not revoking." For this he cites Albany's case, 1 Co. 3, and Digges' case, 1 Co. 174. The same doctrine is recognised in other books, and the same authorities relied upon, and it is said that a bare fine, feoffment or common recovery will not destroy or extinguish them—But that powers appendant, or powers in gross, may be destroyed in either of those ways.

The argument of the plaintiff's counsel has thrown Haslen's power of appointment in the first class of powers, and takes it for granted that he has not exercised it by his deed to Kean, and that consequently that deed cannot be considered as a release of it, or as affecting it in any respect whatever. The correctness of the principal laid down by Mr. Powell may be admitted—But it cannot be admitted that Haslen's power of appointment, resembles either of the instances of collateral naked powers by him set forth in the passage above recited—Hargrave in his notes on Co. Lit. 271, B. note 231, says, that by a general power of appointment is understood that kind of power which enables the party to appoint the estate to any person he thinks proper, and in this sense it is opposed to a particular or qualified power, which enables the party to appoint to, or among particular objects only. A general power enables the party to vest the whole fee in himself or any other person; in fact, therefore, giving the person such a power, is nearly the same, as giving the absolute fee, the only difference is, that it enables him to do thro' the medium of a seisin previously created, that, which if the fee had been actually limited to him, he might do by a conveyance of the land itself—so that in both cases his power of alienation is of the same extent.

Again, where there is a general power given to a person for such uses as he shall appoint, this gives him such a do-

minion over it, as will subject it to his debts. 3 Atk. 656. 1 Atk. 465—2 Atk. 172—2 Ves. 10. In this case, could not the creditors of Haslen, if he had any, have subjected these lands to their debts?

It is stated in Co. Lit. 237, A. "That if he that hath the power of revocation hath no present interest in the land, nor by the ceasor of the estate, shall have nothing, then his feoffment or fine, &c. of the land is no extinguishment of his power, because it is merely collateral to the land."

Can it be said, that upon the ceasor of the estate in Kean, Haslen may not have an interest, in whom there is a general power to direct its course, either to himself or any other person he may think proper. As to powers, merely collateral, there is a very good reason given why they should not be destroyed or extinguished, &c. because says Hargrave, Co. Lit. 342, Note 298, referring to Co. Lit. 265, "collateral powers, are not in the nature of rights or titles, and cannot from their nature be released—But that when powers are given or reserved to any person, having any estate or interest either present or future in the land, the exercise of these powers is considered as advantageous to him, and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of them. But when they are given to strangers, they are intended for the benefit of some third person, and therefore the extinction of them is supposed to be injurious to some person intended to be benefitted by them." In this case who can be injured by Haslen's transferring his interest in either of the ways, before specified? there are no third persons, as in the case of particular or qualified powers, that can sustain any injury—as for instance, where the power of appointment is directed to be exercised in favor of the children of a particular marriage, or particular specified friends of the person creating the powers. It would therefore seem, that Haslen might transfer his interest under the power vested in him; for an interest he certainly had—and the deed from him to Kean, if it was not a strictly regular exercise of the power vested in him, ought to be considered as valid and operating in some other way.

But it is said that the deed to Kean operated as a delegation of power, and that it is a maxim, that "*Delegatus non potest delegare*;" for this is cited, 2 Atk. 88. It will be seen that that was the case of a particular qualified power, to be exercised in favor of particular persons, to wit, children of a particular marriage, where there was a personal confidence and trust reposed. But, it can have no analogy to the exercise of a general power, where there is neither confidence or trust in favor of third persons. But laying these considerations aside, I am of opinion that if there has not been a technical and formal exercise of the power of appointment by the deed from Haslen to Kean, by Haslen, there has been at least a substantial one—He states in that deed, that he is acting in conformity to the power of appointment vested in him by the deed from Blount to Kean, and then directs, limits and appoints, that the lands shall be conveyed, &c. by the said Kean at his discretion to any person qualified to hold, acquire and transfer lands. If then he had power to convey at pleasure to any person he chose, could he not elect to hold the lands himself. Suppose he had conveyed to some third person, could Haslen, in the face of his own deed, compel the purchaser to give up the lands? The effect of the deed to Kean from Haslen will not depend upon the after conduct of Kean, whether he conveyed or not—If lands are devised to one "to give or to sell." These latter words shew the devisor's intention that a fee shall pass; had they not been added, only a life estate would have vested in the devisee. Co. Lit. 9, B. Was. Rep. 266, 1 Wythe's Rep. 6, 88. In this case the legal estate was in Kean, and being there, and he being authorized by Haslen to sell to whom he pleased, I think completed his estate. But it is said, that if Haslen's deed to Kean had any effect, it could only be during the life of Haslen, that after his death, the power of appointment survived to Mrs. Haslen. I think that that power was only intended to vest in her, in case her husband did not exercise it at all; but, if he has properly exercised the power of appointment, he has done it *in toto*.

NOTE.—See S. C., but not so fully reported in 2 Murph. Rep. 309.

ROWLAND *vs.* DOWE—Page 302.

NOTE.—See S. C. reported in 2 Murph. Rep. 347.

DEN ON DEM. OF SIMON PEARCE AND OTHERS *vs.* HOUSE. Page 305.

When the statute of limitations once begins to run, no subsequent disability will stop it. Therefore where an ancestor brought an ejectment, within a year after his title accrued, and continued to prosecute it until it abated by his death, at which period his heirs at law were infants, and they brought another ejectment within three years after their arriving at full age, it was held that they were barred.

Ejectment to recover a tract of 150 acres of land, to which the lessors of the plaintiff claim title under a deed of gift from John Harrell, who was seised of the same and conveyed it to his grandson Esias.

The issue of Esias failed in 1772 by the death of his only daughter and heir at law, who had intermarried with the defendant, who had taken possession under her title, claiming as husband.

Ezekiel and David died before the year 1772. Simon Pearce, one of the lessors of the plaintiff, is the grandson and heir at law of Ezekiel, whose claim it is admitted is saved from the operation of the statute of limitations, by the disabilities of himself and of those under whom he claims.

The other lessors are the heirs at law of David and Josiah. Soon after the issue of Esias became extinct, to wit, in October, 1779, Josiah commenced an action for the land in question against William House, the defendant, which action abated in 1778, by Josiah's death, his issue and heirs at law being infants, and that disability has continued in them

until within three years next before the commencement of this action.

Noah, the son of David, came of age and brought an ejectment in 1782, and was nonsuited in 1783; he afterwards, about the same year, took possession of that part of the land which had been allotted to the widow of Esias, and he, and those claiming under him, have been in possession ever since, but under what title does not appear.

Twenty-five or thirty years ago, the defendant House obtained a deed in fee from the heir at law of the donor in the deed of gift, and has continued in possession thereof in virtue of his marriage with the heir at law of Esias.

Browne for the plaintiff. The reason of the limitation of actions is precisely the same wherefore a descent cast tolled an entry; 3 Bl. 188, Co Lit. 250 b. note 1, it ought to follow then, that whatever prevented an entry from being tolled by descent, ought to prevent the statute of limitations from running. Where the strongest construction was put on the statute of limitations, it was compared to a descent at common law. 1 Ld. Raym. 741. Ballentine 41, 2 Salk. 421. But the act of 1715, by its very words, only imposes a limitation on the prior right of entry in a particular case, where the person having that right of entry did not enter or *make* claim within seven years, &c. leaving the right unimpaired in every other case; and in this respect it is different from 21 Jac. 1, Cap. 16. A claim by action will avoid a fine. Plowd. 359. 2 Bl. 354. If one man was in possession of another's lands without title, as a disseisor, or with title, and the real owner, for fear of beating, maiming, death or imprisonment, dareth not enter, then he may make claim, and this claim gives him actual possession and seisin of the lands in law. Litt. sect. 414, 415, 419. And if the tenant die within a year and a day after the claim, the claimant may enter on his heirs, which proves that the seisin and possesssion of the claimant, which was originally given to him by the law, continued in contemplation of law for the year and day. Lit. sect. 422. Because 1. If the disseisor dies within the year, without any claim made by the disseisee,

his entry is tolled, sect. 426; for the general rule is that a descent from a person dying seised and possessed, tolls an entry, and the making of claim prevents the operation of this rule, because in contemplation of law, for a year and a day, the disseisee had possession and seisin, and not the disseisor. 2. If the father, disseisee die, and then the disseisor die within the year and day, after claim made by the father, the heir of the disseisee cannot enter on the heir of the disseisor, because by the death of the disseisee, the possession and seisin which the law vested in him ceased, and then the disseisor died seised, Co. Lit. 250, b. *secus* if the disseisor had died in the lifetime of the disseisee. A claim, however, only amounts to an entry, and vests and continues the possession and seisin in the claimant only for his benefit, and not for his disadvantage. Co. Lit. 253, b. Entering on the land for the purpose of claiming, is a claim and not an entry. Plowd. 93. Bringing and continuing to prosecute a suit was a continual claim. Lit. 442. When a man does all that the law authorises him to do, that is, brings a suit, it amounts to a claim, and vests the seisin and possession in him for his benefit; and continuing to do all that the law enabled him to do, that is, prosecuting the suit, must continue the possession and seisin in him.

A. Henderson, for the defendant. It is undoubtedly settled, that when the statute of limitations begins to run, a subsequent disability will not stop its running. 4 Term Rep. 480. It began to run against Josiah in 1772, and continued to run, notwithstanding the suit in ejectment brought by him; for that alone is not sufficient to stop it; there must have been an actual entry. "A claim or entry to prevent the statnte of limitations must be upon the and, unless there be some special reason to the contrary." *Ford* v *Gray*, 1 Salk. 285. The entry which is confessed by the defendant in one ejectment, being only fictitious, can have no influence upon a second ejectment brought after the time has run. 1 Saunders, 319, c. Trusting the case to these obvious principles, it is unnecessary to enter into an examination of the effect of bringing a real action, either as revesting the seisin, or impeding the efflux of time.

SEAWELL, J. I think the plaintiff is bound by the act of limitations, and therefore cannot recover.

An ejectment is a possessory action, and the lessor of the plaintiff must have the *right* to enter for the purpose of making the lease. Whenever that right is destroyed, the ejectment, which is founded upon such supposed right, must fail; and when such action is brought, it is incumbent upon the plaintiff to shew this right of entry. The act of 1715 limits this right of entry to seven years, and unless a plaintiff can shew a possession of himself or those under whom he claims, within seven years, that right becomes barred. There is no substantial difference between our act and that of James, except as to the length of time; and Lord *Mansfield*. in *Taylor* v *Horde*, reported in 1 Burr. 60, says the plaintiff in ejectment must fail without shewing such possession or *accounting for want* of it, under some of the exceptions contained in the statute of James. Whatever may be the effect of bringing an action so as to prevent a descent from barring an entry, according to the rules of the common law; it is very clear, that under the act 1715, one action cannot be used so as to prevent the operation of the act against a subsequent one, unless the subsequent action be brought within one year; and as to the second suit, there is no saving whatever.

It is not therefore necessary to enquire, whether the suit of the ancestor failed under such circumstances as admit of a new suit being benefited by it, or whether or not, that section of the act relates to real actions, as this suit was not brought within one year. Mr. Justice *Buller*, in his law of Ni. Pri pa. 102, lays it down as established law, that the plaintiff must show such possession, and also adds, that another suit *within* twenty years will not be sufficient, and to this may be added the very respectable opinion of Mr. Williams, in his notes on Saunders's Reports; 1 vol. 319, & 3 vol. 173, note 2, who seems partly to accord with the doctrine, and Lord *Holt*, in the case of *Ford* v *Gray*, reported in Salkeld, says, that an actual entry to avoid the act of limitations must be made, unless there be good reasons for not

doing so. As therefore a continual claim is nothing but an *entry in law*, and as a suit is but *equal* to a claim, according to this case, even if a suit were to be considered as a kind of entry, still it would not avail, unless there were *special reasons* for not making an actual entry. It seems never to have occurred to Mr. Justice *Buller*, or Mr. Williams, that by the bringing of the first suit, the plaintiff became possessed in law; and Mr. Williams, by way of caution, advises where the right of entry is nearly elapsed, that before the bringing the suit, the plaintiff should make an *actual* entry, which, in case of failure in the suit contemplated, will serve in another, though there the twenty years be expired, if the last suit shall, according to the statute of Anne, be brought within one year of the entry.

And this opinion obviously suggests another remark, in respect to the effect of the suit. If the bringing the ejectment is equal to a claim, and a claim equal to an entry, the bringing of this suit without any actual entry would have had the same effect upon the subsequent suit. As the whole of the proceedings of ejectment are fictitious, the confession by the defendant of lease and entry only applies to a fictitious statement, and is therefore no evidence of such a lease and entry, but merely to try whether, when they are *stated* to have taken place, the lessor had power in law to make them.

The act therefore having commenced its operation in the life-time of the lessor of the plaintiff's ancestor, will continue to run without being controlled by subsequent disabilities; and the suit brought by the ancestor, having no influence upon the present action; and as more than seven years have elapsed since the time, the action or right of entry accrued to the ancestor; both he and his heirs stand barred by the act from entry or claim.

HALL, DANIEL, & RUFFIN, J. concurred.

NOTE.—See *Andrews* v *Mulford*, 1 Hay. Rep. 311. and the cases referred to in the note upon the question of the statute of limitations. The right of one of several co-heirs may be preserved by his being under a disability, whilst the rights of the others who are under no disability may be barred. *Mc Cree* v *Alexander*, 1 Dev. Rep. 321.

DEN ON DEM. OF ARRINGTON AND OTHERS *vs.* ALSTON.
Page 310.

NOTE—See S. C. reported in 2 Murph. Rep 321.

POWELL AND OTHERS *vs.* S. POWELL'S EX'RS—Page 315.

NOTE.—See S. C. reported in 2 Murph. Rep. 326.

JONSTON *vs.* DONALDSON, EX'R OF CLARKSON—Page 317.

Where account books are put into the hands of a constable for collection, the books themselves are not evidence that the accounts are due, so as to charge the constable.

This was a bill in equity calling upon the defendant as executor to account for monies collected by his testator for the use of the complainant, under the following circumstances. Vance was indebted to the complainant, and to secure the payment of the money, assigned over his books and accounts, with authority to collect the sums due. The complainant placed these books and papers in the hands of Clarkson, at that time a constable in the county, who, for a specified sum, agreed to collect as many of the book debts as possible and take bonds for the residue. Upon the answer coming in the matter was referred to the master, who reported that there was £757 8 due according to Vance's books, and after deducting the payments proved to have been made to Vance before the assignment, the compensation

agreed to be given to Clarkson, and the notes deposited in the office, found a balance due the complainant from the defendant of £386 8 1. An exception was taken to the report of the master, because he charged the defendant with the sum appearing to be due on Vance's books, although no testimony was produced to shew that any account charged on the books was justly due, and the complainant did not, when he delivered the books to Clarkson, shew that any part of the same was capable of being established by proof.

Daniel, J. The books of Vance were not of themselves sufficient evidence to authorise the clerk and master to report in favor of the complainant under the agreement set forth in the bill. The report must be set aside.

Note.—See *State Bank* v *Clark*, 1 Hawks 36.

INDEX, &c.

ATTACHMENT.

1. A party may interplead to an attachment at any time before final judgment; and to enable him to do so, it is regular to set aside a default which has been entered up two terms. *Dobson* v *Bush*, 18
2. A creditor, who is a citizen of this State, may attach the property of his debtor found here, though such debtor is a citizen of New York, and, by an insolvent law of that State, his property has been assigned for the general benefit of his creditors. *Bizzell* v *Bedient*, 233
3. A surplus of money in the hands of a sheriff, raised by execution, is the property of the defendant in the execution—is held by the sheriff in his private and not in his official capacity, and is liable to attachment in the hands of the sheriff by the creditors of such defendant. *Orr* v *McBride*, 236
4. By the special wording of the two acts of 1777 and 1793, (1 Rev. Stat. ch. 6,) a final judgment in an original attachment is equivalent to a final judgment in any other case; and debt will lie on it. *English* v *Reynolds*, 529
5. An action of debt will not lie on a replevy bond given under the attachment law; a *sci. fa.* being the proper remedy. *Summers* v *Parker*, 579

APPEAL.

1. Where there were but twenty-nine days between the last day of the term of the County Court, and the first day of the Superior Court, it was held that the appellant had until the term following to file the appeal. *Orme* v *Smyth*, 32
2. An appeal bond, which leaves out the most effective part required by law, to-wit: that the securities shall be discharged on the performance by the appellant of

the judgment above, is insufficient. *Forsyth* v *McCormick*, 359

3. If the appellee in the Superior Court suffers the cause to go to the jury, it is an implied waiver of any objection, arising from the defectiveness of the appeal bond; and the appellant in such case may proceed in the suit. But the Court may, in their discretion, upon a proper case, require further security. *Ferguson* v *McCarter*, 544

4. If an appeal from the County to the Superior Court is not filed within the time limited by law, it must be dismissed, although such omission proceeds from accident, and without *laches* in the appellant; but in such cases a *certiorari* will be granted. *Hoad* v *Orr*, 584

AVERAGE.

Where a defendant's trunk containing money and apparel, was put on board the plaintiff's lighter, which was overset in a sudden flaw of wind, in consequence of not being provided with shifting boards, *it was held* that the defendant was not liable to contribute to the expense of raising the lighter, although by such means he obtained his trunk: for the claim could not be made on the ground of a general average, as that can arise only where a portion of the cargo is sacrificed for the safety of the rest, and that by the direct agency of man, by throwing overboard the cargo of the vessel in a moment of peril, nor on any other ground, because the damage and consequent expense was occasioned by the neglect of the owner in not providing shifting boards which were necessary for the safety of the lighter. *Irving* v *Glazier*, 406

ALIEN.

When a subject of the King of Great Britain was duly naturalized in one of the States, before the adoption of the Federal Constitution, and continued to reside there till that event, he became by virtue of it a citizen of the United States. *Seare* v *White*, 210

AMENDMENT.

1. Where several persons were sued in covenant, two of whom, on oyer had, appeared not to be parties to the deed, the plaintiff was permitted to amend by striking out their names on payment of all costs up to the time of amendment. *McClure* v *Burton*, 84
2. The Court has power to give leave to amend a declaration upon the payment of costs, after a special demurrer filed and sustained. *Davis* v *Evans*, 111
3. When, in entering up a verdict, a mistake is made in computing interest, and judgment is entered up for less than the plaintiff is entitled to, but such mistake is not discovered until the next session of the court, leave to amend must be refused; for there is nothing to amend by, and to alter it would be to make a new verdict for the jury. *Baker* v *Moore*, 441
4. A *sci. fa.* against heirs may be amended, after the plea of *nul tiel record* pleaded, on payment of the costs up to the time of the amendment. *Williams* v *Lee*, 578

ABATEMENT.

1. A *qui. tam.* action for usury abates by the defendant's death. *Smith* v *Walker*, 223
2. When the defendant dies, and a *sci. fa.* against his administrator regularly issues from term to term, although not actually served until after the lapse of five terms, the suit will not be abated. *Clements* v *Hussey*, 414

ACQUIESCENCE.

When an attorney in fact conveys land, but his power is so defective as not to enable him to convey the legal title, an acquiescence by the owner and his heirs amounts to a confirmation of the contract, and gives an equitable title to the purchaser. *Benzein* v *Lenoir*, 117

AGENT AND PRINCIPAL.

1. An action will not lie against a person who describes

himself in the contract which he executes, as agent for another. *Potts* v *Lazarus*, 180

2. An action may be sustained in the name of the United States, on a covenant made in their behalf by a public officer, and their special agent *quoad hoc*, although such agent do not sign and seal the contract in their name. *United States* v *Blount*, 181

ASSUMPSIT.

1. In an action of assumpsit against two since the act of 1789, (1 Rev. Stat. ch. 31, sec. 89 and 90,) where the jury find that one did assume and the other did not, judgment may be entered in favor of the plaintiff against the one who is found to have assumed. *Jones* v *Ross*, 335

2. Where W. is indebted to both the plaintiff and defendant, and the latter authorises an agent to collect his debt, but not to bind him by deed, and the agent purchases from W. a vessel on account of his principal, whose debt is to go into part payment, and by an agreement under seal the balance is to be paid to the plaintiff; afterwards the defendant knowing what his agent had done, approves of it and receives the vessel; still the plaintiff cannot maintain assumpsit against the defendant for the sum agreed to be paid to him by the deed. *Dickinson* v *Rodman*, 525

BAIL.

The plaintiff in a *sci. fa.* against bail, is not bound to produce the bail bond on the plea of *nul tiel record*. *Mason* v *Cooper*, 83

BAILMENT.

The hirer of a slave is not responsible for his loss, though killed while in the hirer's service, if he used ordinary care and attention, such as a prudent man would afford to his own property. *Williams* v *Halcombe*, 33

BILLS AND PROMISSORY NOTES.

1. If in ordinary cases, the maker of a note has become

insolvent, has absconded or refused to make payment, this will be sufficient to charge the endorser upon due notice of the fact. *Sullivan* v *Mitchell*, 93

2. A personal demand on the maker is not necessary; it is sufficient if it be made at his house, but if the house be shut and the maker gone away, some endeavors must be made to find him out. *Ibid*, 93

3. Whenever a bill of exchange or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary whether the maker live at the same place or a different one. *Ibid*, 93

4. A note made payable at a particular Bank must be demanded at the Bank, in order to render the endorser liable. *Ibid*, 93

5. An endorsement in full on a negotiable instrument may be struck out on the trial. *Dickinson* v *Van Noorden*, 109

6. When a note was endorsed as follows: "pay the contents to W. or his order, for value received, with recourse to me at any time thereafter, without further notice," *it was held* that a cause of action accrued against the endorser, without notice, from the return of an execution against the drawer, by which nothing was made; but the terms of the endorsement did not render the endorser liable at any indefinite period of time. *Wister* v *Tate*, 404

7. Notice to an endorser of the non-payment of a note should be given by the holder or by some person authorised by him. It should also intimate to the endorser that he is looked to for the payment of the money. *Brower* v *Wooten*, 507

8. A person endorsing a note for the accommodation of the maker, is entitled to notice of non-payment. *Smith* v *McLean*, 509

9. Where a note is made payable at a particular bank, it must be presented there, when it falls due otherwise the endorser is discharged; and that even although the maker of the note dispenses with such notice. *Ibid*, 509

10. If the attorney employed by the owner of a note to sue on it, strike out an endorsement, it discharges the endorser. *Ibid*, 509

BOUNDARY.

1. When a patent calls for a stake in the line of another patent, and then a certain course "with or near" a line of the latter, it must stop at the intersection with the first line of the latter, if the second line from that point would run *with* or *near* the line of the patent called for, but would not do so if run from the intersection with the second line. ***Bradberry*** v ***Hooks***, 443
2. The court will not decide on the admissibility or effect of evidence respecting the actual running a line, when such evidence was not introduced; as such a question is purely abstract. *Ibid*, 443
3. Where the patent described the land as lying on the north side of a river, and the line in dispute called for "a pine on the Marsh branch, then along the said branch 320 poles, thence to the beginning," and the branch meets the river at a shorter distance; *it was held* that the branch was the boundary, and the mouth of it, the corner of the land covered by the patent, and that the distance was to be disregarded. *Carroway* v *Witherington*, 694

BILL OF REVIEW.

A bill of review will not lie when the complainant himself dismisses the bill. But if on a demurrer to a bill of review the court reverses the decree, without the objection that the original bill had been dismissed by the complainant being brought to its notice, the question of dismissing the bill of review is not open *on motion;* a petition to rehear being necessary. ***Jones*** v ***Zollicoffer***, 45

BOND.

1. Although a bond is not invalidated by being made without consideration, or with an inadequate one, yet evidence of either fact may be received when the question is, whether the bond was made under such circumstances of *fraud and imposition*, as render it void in law. *Lester* v *Zachary*, 50
2. When a bond is given for the hire of a slave for a year, in the course of which time the slave becomes disabled and ultimately dies, there can at law be no

apportionment of the sum agreed to be paid. *Ragland* v *Cross*, 219
3. An action will not lie on a bond, part of the consideration of which is an agreement not to prosecute for malicious mischief. *Cameron* v *McFarland*, 299
4. Every transaction, the object of which is a violation of public duty is void; such as bribes for appointing to offices of public trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured; agreements to stifle prosecutions of a public nature; and wherever it is attempted by a contract, to prevent the due course of justice, as if one promise money to another to suppress his testimony in a cause, &c. the law gives no remedy. *Ibid*, 299

CATTLE.

The penalty under the act of 1741, for mismarking cattle cannot be incurred, unless the offence be wilfully done. *Hulin* v *Biles*, 625

CERTIORARI.

1. If the Clerk of the County Court neglect to take a bond from the party previously to issuing a *certiorari* as directed by the act of 1810, (1 Rev. Stat. ch. 4, s. 16), the Superior Court has power to take bond with good security for the prosecution of the suit. *Fox* v *Steele*, 48
2. A *scire facias* will not lie on a bond given upon obtaining a writ of *certiorari*. *Ibid*, 48
3. When a person applies for the extraordinary remedy of a *certiorari*, he ought to show good reason why he did not avail himself of the ordinary remedy by appeal; otherwise a *certiorari* will not be granted. *McMillan* v *Smith*, 173
4. In considering the propriety of sustaining or dismissing a *certiorari*, on an appeal from the decision of the Superior Court, the court will not notice affidavits on either side, which have been made and sworn to since the case was transferred to the Supreme Court. *Ibid*, 173
5. Where the defendant appealed from the County to the Superior Court, but by mistake, the plaintiff exe-

cuted the appeal bond instead of the defendant, the appeal was dismissed for want of a proper bond; but a *certiorari* was directed on the defendant's motion. *Speed* v *Harris*, 317

6. If the clerk of the county court neglect to take a bond from the party, previously to issuing a *certiorari* as directed by the act of 1810, (1 Rev. Stat. ch. 4, s. 16,) the Superior Court has power to take bond with good security for the prosecution of the suit. *Rosseau* v *Thornberry*, 326

7. When a party swears that a judgment final by default was taken against him at the appearance term, which he was prevented from attending by a violent attack of sickness, that he applied at the next term to have the judgment set aside which was refused, and that he has merits, a *certiorari* will be granted him. *Dyer* v *Rich*, 413

8. When the Clerk of the County Court acted as deputy of the Clerk of the Superior Court, and promised the appellant to file the appeal, and though he did not actually place the papers in the office, considered them as filed, and so informed the Clerk of the Superior Court, but the papers were not actually filed until a week before the court, a *certiorari* was granted. *Steele* v *Harris*, 440

9. Where an undue allowance of a year's provision is made to a widow, a distributee of the estate is entitled to a *certiorari*, because the act of Assembly recognizes his right, *quoad hoc*, as a legal one. *Bryan* v *Perry*, 617

10. Every person affected in interest by an *ex parte* proceeding in an inferior court, shall have, upon a proper case, a writ of *certiorari*. Their rights shall not be concluded by an *ex parte* transaction; but they shall have an opportunity of a trial; and as the writ of *certiorari* is the only remedy, they shall have that. The year's provision to which a widow is entitled under the act of 1796, (1 Rev. Stat. ch. 121, sec. 18 & 20,) is for the easy and comfortable subsistence of *herself and children*, and their necessary servants or attendants; and not for the support of the slaves and stock which she obtains as her part of her husband's estate, or otherwise acquires after the death of her husband. *Ibid*, 617

CHARITABLE USE.

A charitable purpose under the statute of 43rd Elizabeth, must be so described in a will, that the law will at once acknowledge it to be such. *Haywood* v *Craven*, 360

CONSTITUTION.

1. The act passed in 1812 "to suspend executions for a limited time," commonly called the suspension act, is unconstitutional, it being prohibited by that part of the 10th section of the 1st Article of the Constitution of the United States, which says that no State shall pass any "law impairing the obligation of contracts." *Jones* v *Crittenden*, 55
2. That part of the suspension act of 1812, which authorised bonds to be given to the sheriff having an execution in his hands, and execution to issue, is constitutional. *Berry* v *Haines*, 311
3. A law may be valid in some parts, though in others it infringe the constitution, and only such parts of the suspension law as impair the obligation of contracts are void. Therefore a surety, who had executed a bond under the act, was held liable to an execution, without a suit and without notice of a judgment to be moved against him. *Ibid*, 311
4. An act of the Legislature emancipating slaves belonging to the estate of an intestate, without the consent of the administrator, is unconstitutional. *Allen* v *Peden*, 442

CONTRACT.

Where A. contracted to sell a tract of land to B., by a written agreement, and gave up the possession to B., with an express stipulation that the title should remain in the vendor, till the purchase money was wholly paid, and afterwards an execution issued against A., which was levied upon this land, and it was sold to C., who had notice of B's equitable claim, *it was held* that the land was liable to the execution which, with the sale, divested A's legal title; but that as B. purchased with notice of C's equitable claim,

he should convey to him upon receiving the unpaid balance of the purchase money. *Linch* v *Gibson*, 676

CONFISCATION.

1. A person, who, being a prisoner of war in July 1777, and refusing to take the oath of allegiance, conveyed lands to his son, then a resident of this State, might lawfully do so, notwithstanding the confiscation acts passed in 1777, 1779 and 1782. *Campbell* v *McArthur*, 552
2. The confiscation acts have no retrospective operation, except such as is confined to the property of the enemy. So that if an estate has been conveyed from one enemy to another, it is still within their operation; but if from an enemy to a citizen, it then has the guaranty of the constitution. *Ibid*, 552
3. There is no principle in the common or statute law of this State, nor in the law of nature, which forbids any individual, upon the formation of a new government, to dispose of his property, and to remove his person. *Ibid*, 552

COSTS.

1. A plaintiff who fails in his action, is liable to the costs of all the defendant's witnesses, though they were not examined, if it appear that they were called, sworn and put in the care of the sheriff. *Venable* v *Martin*, 128
2. Where heirs were made parties by *sci. fa.* to an action of trespass *quare clausum fregit* originally brought against their ancestor, and after the lapse of several years the *sci. fa.* was dismissed on the defendants' motion, on the ground that they were not properly made parties; *it was held* that they were not entitled to costs, as they would have been, had they plead in abatement. *Porter* v *Knox*, 134
3. On the acquittal of a defendant in an indictment for petit larceny, the court may order the prosecutor to pay the costs. *State* v *Lumbrick*, 156
4. In no case, where the punishment extends to life, limb or member, can the court, on the acquittal of the defendant, order the prosecutor to pay costs. But in all other cases it may be done under the act of 1800,

(1 Rev. Stat. ch. 35, sec. 27,) if the prosecution should appear to be frivolous or malicious. *Ibid*, 156

5. When an indictment is found, upon which the defendant is recognised to appear from term to term, and afterwards a *nolle prosequi* is entered upon a defect being discovered in the bill, the defendant will be liable to pay for the attendance of the witnesses the whole time, if a new bill be found against him for the same cause and he be convicted thereon. *State* v *Harshaw*, 230
6. If an indictment be quashed, and the prosecutor be ordered to pay the costs, he is not liable to pay for the attendance of witnesses on either side. *Office* v *Gray*, 307
7. When the lessor of the plaintiff in ejectment enters on the premises, during the pendency of the suit, he becomes liable to pay the costs of the suit. *Gubbs* v *Ellis*, 415

COVENANT.

1. No action can be maintained upon a charter party to recover freight, without the plaintiff's averring in his declaration, and proving on the trial that he had carried the goods according to the terms of the covenant. *Lorent* v *Potts*, 86
2. In an action of covenant for quiet enjoyment, a recovery of damages in trespass *quare clausum fregit*, is sufficient to amount to a breach. *Williams* v *Shaw*, 630
3. The judgment in such action is evidence to show the eviction, but is not conclusive against the warrantor as to the title of the land. *Ibid*, 630

DEED.

1. Where by deed a negro slave was given "to J. C. and his heirs, for him and his wife to have the use of the said slave their natural lives; and at their death for said negro and increase, to be equally divided amongst their children, the said J. C. to use the said negro as his own property, not to sell her, but for his heirs to use and sell, at their own free will and pleasure," *it was held* that a proper construction of the deed gave to J. C. a legal estate for life in the slave

with a legal remainder to his children, which, being contrary to law, J. C. took an absolute interest in the slave. *Dowd* v *Montgomery*, 198

2. A bill of sale, like other deeds, takes effect from the delivery. A bill of sale which purported on its face to have been executed on the 10th of November, 1810, but which was attested by the only subscribing witness on the 10th of January, 1811, was held to have been delivered at the last period, there being no proof of any prior delivery. *Nichols* v *Palmer*, 319

3. A deed cannot operate as a bargain and sale, unless it has a pecuniary consideration; nor as a covenant to stand seized to uses, unless the consideration be love and affection for a near relation, or marriage. Affection for an illegitimate child is not a sufficient consideration. *Blount* v *Blount*, 389

4. Where an attorney in fact conveys land in his own name without reference to his power or his principal, nothing passes by the deed. *Scott* v *McAlpin*, 587

5. Where a deed described a tract of land which was conveyed by it, and then followed these words, "one-half acre of land where my grave yard is, &c. is excepted. Together with forty-five acres, &c. also another tract containing fifty acres, &c;" *it was held* that the grave-yard only was excepted, but the two last tracts were granted. *Jordan* v *Hollowell*, 605

DEVISE.

1. Where a testator devised as follows: "I give and bequeath to the children of G. W. L. provided he has any, if not, to the heirs of my sister S. the land which lies between the road, &c." and it did not appear from the will that the testator knew of his sister S. being alive, *it was held* that the word "heirs" must be taken in its legal acceptation, and will not operate as a *descriptio personarum*. *Den on Dem. Stith* v *Barnes*, 96

2. Where a testator in the year 1783 devised "to his son B. three hundred and fifty acres of land;" and by another clause devised thus: "I give and bequeath to my son B. and my four daughters all the rest of my estate, consisting of various articles too tedious to mention," *it was held* that B. took only a life estate under the first clause; and that the reversion did not pass to B. and the daughters under the residuary

clause, but descended to the heir at law, though there was a clause in the will giving him twelve shillings. *Harrison* v *Mills*, 149

3. A devise of land "to A. and the male heirs of his body, lawfully issuing, and if A. dies without leaving lawful issue as aforesaid, I give the land to the eldest son of B." means a dying without issue living at the death of A., and the devise is a good executory one to B's oldest son. *Jones* v *Spaight*, 157

4. Where a testator devised "to his grandson A. L. 350 acres of land, being the upper part of a tract of 700 acres, and to his grand-daughters P. L. and J. L. the lower part of the same tract, to be equally divided between them," and the tract of land was found to contain in fact 1,100 acres; *it was held* that the grandson A. L. was entitled to only 350 acres, and the grand-daughters to 375 acres each. *Williams* v *Lane*, 246

5. Describing a tract of land as containing a specific number of acres, is the same as the description of a tract, containing so many acres more or less. *Ibid*, 246

6. Where a testator devised lands to his "daughter A. B. to her and her husband during each of their lives, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heir, to that and its heirs forever, otherwise to return to my heirs at law and their heirs forever; it was held that the limitation came within the rule in *Shelly's case*, and that upon the death of the husband, the land survived to the wife in fee. *Williams* v *Holly*, 266

7. Where a testator devised lands "unto B. B. to him and his heirs of his body, lawfully begotten; and for want of such, to the heirs of M. T. B." and, in other parts of his will noticed that M. T. B. was then living, but she had no children then, or ever afterwards, *it was held* that the limitation to the heir of M. T. B. was contingent, dependent upon the estate tail in B. B., and that upon his dying without issue in the lifetime of M. T. B., the remainder never took effect. *Chessun* v *Smith*, 274

8 Where a testator, having a store house and tavern in a town adjoining each other with a curtilage in the rear of both, devised the store-house to his wife for life, remainder to his son; and by another clause devised to his son-in-law and daughter his "large tavern, excepting however the room over the store, which is to belong to the store;" *it was held* that the

ground in the rear of both buildings, passed under the devise of the tavern; for the exception of the room over the store indicated a belief in the testator that he would have conveyed that too, under the devise of the tavern, without such exception, and besides a curtilage is necessary to a tavern, but not to a store, in a town. *Barge* v *Wilson*, 278

9. Wherever the intention of a testator is to create a trust which cannot be disposed of to charitable purposes, and is too indefinite to be disposed of to other purposes, it reverts to the heir at law or next of kin. Hence a direction by a testator that his slaves shall be set free, or a bequest to his executors of his slaves in trust that they will set them free, is against public policy and void, and the slaves consequently result to the next of kin. *Haywood* v *Craven*, 360

10. Where a testator devises a mill to one of his sons, and to another an entry of land which included the land used for a pond, the part covered by the pond passes to the first son by the devise of the mill. *Lee* v *Woodward*, 537

11. Where a testator bequeathed to his wife "two negroes, during her natural life, and one-half the land which I now live on, during her natural life, and then to return to my son William;" *it was held*, that the limitation to the son was confined to the land, and that the negroes were distributable after the death of the wife among the next of kin of the testator.—*Sneed* v *Harris*, 672

12. Where a testator devised land, and afterwards sold it, but did not convey, *held* that the will was not thereby revoked. *McRainey* v *Clark*, 698

DEPOSITION.

1. A notice to take the deposition of a witness living in Georgia on one of three successive specified days, is sufficient. *Harris* v *Peterson*, 358

2. In equity the deposition of a witness who is dead, which has once been read upon the hearing of a suit, may be read again though taken before a single person. *Carver* v *Mallet*, 562

DESCENT.

1. Where a person seized in fee prior to 1784, devised

lands to his heir at law in tail, *it was held* that the heir took by purchase; that the act of 1784, (1 Rev. Stat. ch. 43, sec. 1,) which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase; and that therefore when the devisee died leaving a brother and sister of the half blood in the maternal line, and more distant relatives in the paternal line, the former were entitled to the inheritance. *Ballard* v *Griffin*, 237

2. Where a devisee takes the same estate under the will, which he would have done had the ancestor died intestate, he is in by descent, and the devise is void. Hence, where a testator devised lands in 1788 to be equally divided among his two daughters, (they being his only children) to them and their heirs forever, they took as tenants in common, as they would so have taken under the act of 1784, (Rev. ch. 204,) had he died intestate. *University* v *Holstead*, 289

3. And in such a devise, if the mother survive the daughters, both of whom dying intestate and without issue, she will not be entitled to a life estate under the act of 1784, (Rev. ch. 204, sec. 7, and ch. 225, s. 3,) because the derivation from the parent there mentioned, signifies by some act *inter vivos*. *Ibid*, 289

4. Under the acts of 1784, the aunt of the whole blood on the side of the mother from whom the lands descended, shall take in exclusion of a brother of the half blood on the part of the father. *Hilliard* v *Moore*, 392

DOWER.

Where a deed was executed by a woman and her intended husband, before their marriage, by which he conveyed all the land he then had or might thereafter acquire in trust for certain purposes: *it was held* that this deed could only operate upon such lands as the bargainor had at the time of its execution, and that lands acquired subsequently did not pass under it; and that therefore the wife was endowable of all the lands subsequently acquired. *Arrington* v *Arrington*, 232

EJECTMENT.

1. In ejectment the first grant will prevail, without re-

gard to the time of entry or survey; and in such case no evidence will be received to show that the grant was obtained by fraud. *Williams* v *Wells*, 52

2. If, in ejectment, the lessor of the plaintiff claim title under a grant describing the lands as confiscated lands, the property of a certain person, it is incumbent on him to shew that the lands had been confiscated to authorise the issuing of the grant. *Hardy* v *Jones*, 144

3. Where A. conveys to B. with warranty, and B. to C. with warranty, and C. is evicted, whereupon B. pays C. and A. pays B. A. cannot support an action of ejectment for the land, for having once conveyed it, the repayment of the purchase money cannot operate as a reconveyance. *Clayton* v *Markham*, 213

4. When the defendant in an action of ejectment died between the Spring and Fall Terms of the same year, and his death was suggested at the latter, a service on the guardian of the infant heirs on the first day of the ensuing term is sufficient under the act of 1799, (1 Rev. Stat. ch. 2, sec. 7.) *Ray* v *Simpson*, 227

5. No very strict certainty in the description of lands in a declaration in ejectment is necessary to warrant the writ of possession. Hence *it was held* that a description in the following terms was sufficient for that purpose; "one tract of land, containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke, on the south side, it being part of 350 acres granted to J. M. the 7th Nov. 1730, beginning at a sycamore tree, supposed to be Colonel C. P's line, and so extending out and in, according to courses of patent aforementioned, to conclude and make out the above said 150 acres, with the appurtenances." *Byrd* v *Clark*, 425

6. A color of title, without seven years continued possession, will not entitle the plaintiff in ejectment to recover, even against an intruder. *Sheppard* v *Sheppard*, 545

EQUITY.

1. A Court of Equity will not interfere where the party has a fair and complete remedy at law. Therefore it will not entertain a bill to compel a reprobate of a will, the complainants having been infants and

not represented when the will was proved. *Thorn* v *Williams*, 30

2. Where the administrator sells at vendue a slave, as the property of his intestate, and recovers judgment on the bond given for the purchase money, and the son of the intestate, claiming the slave by gift from his father, threatens to sue him for it; equity will prevent the suit by injunction, as the parties are now all before the court and full justice can be done them; and it will also prevent the administrator from taking out execution, until the title is ascertained or the purchaser indemnified. *Curtis* v *Hartsfield*, 114
3. A person being an alien is a good reason for not making him a party. *Benzein* v *Lenoir*, 117
4. Where suits are brought in a Court of Equity over the subject matter of which, courts of common law, as well as the court of Equity, have jurisdiction, the court of equity will consider itself as much bound by the statute of limitations, as a court of law; but where it has exclusive jurisdiction, as in all cases of trusts, the statute does not stand in the way. *Ibid*, 117
5. Where one signed his name to a blank administration bond, under a well founded belief that another was to become security with him, but who failed to become so, equity will not grant relief against him who signed. *Webb* v *Jones*, 123
6. Where a testator devises all his estate to his wife, after payment of debts, and does not direct out of what fund they shall be paid, and the will passes only personalty, having but one witness, equity will not interpose, in favor of the widow, to exonerate the personal estate, and charge the real estate with the payment of the debts. *Carney* v *Coffield*, 140
7. Where a party has a legal defence and neglects to avail himself of it in a court of law, he cannot have relief in equity. *Gatlin* v *Kilpatrick*, 147
8. Equity cannot relieve against a verdict at law for being contrary to equity, unless the plaintiff knew the fact to be different from what the jury have found it, and the defendant was ignorant of it at the time of trial; or where effectual cognizance cannot be taken at law; or where a verdict is obtained by fraud. *Ibid*, 147
9. A creditor or next of kin cannot, without special circumstances, call upon a debtor to the estate, but a bill will be entertained for either against all persons in

possession of the fund, who have not paid for it a valuable consideration, the administrator or executor of the estate being a party to the suit. *Blanchard* v *McLaughan*, 285

10. A bill in equity will lie in the courts of this State to compel the conveyance of lands in Tennessee, if the defendant be within the jurisdiction of the court. *Orr* v *Irwin*, 351

11. A court of equity still retains its jurisdiction in cases of contribution of surety against another, notwithstanding the act of 1807 (1 Rev. Stat. ch. 113, sec. 2) gives a jurisdiction in such cases to the courts of law. *Shepherd* v *Monroe*, 427

12. Where a judgment is recovered at law on a gaming bond, equity will not interfere, if no fraud was used in obtaining the judgment, or the complainant was not prevented from making a defence at law. *Jones* v *Jones*, 547

13. A court of equity will not interfere where the ordinary rules of law afford complete and adequate relief; for the object of equity is to supply the deficiencies of the law. Therefore where a person has a right to a ferry, and another sets up a free ferry, in the neighborhood, whereby the owner of the ferry loses his profits, an injunction will not be granted to stay the free ferry, because a court of law may place the owner of the ferry *in statu quo*. *Long* v *Merrill*, 549

14. A court of equity will not proceed against an infant, unless defended by a guardian *ad litem*; and the court cannot appoint a guardian for an infant out of the jurisdiction of the court. *Jones* v *Mason*, 561

15. As a court of Equity acts *in personam*, it cannot dispense with the personal service of process, in cases not provided for by statute. Hence it will not proceed on a bill to foreclose a mortgage, where all the defendants are infants and reside in another State. *Ibid*, 561

ENTRY.

1. No cases in relation to the entry of vacant lands are operated upon by the act of 1779, authorising *caveats*, except those which arose from the discontinuance of the land offices. In all other cases the first enterer must prevail. *McNeil* v *Lewis*, 517

2. The acts of limitation, in regard to land titles, are founded upon the presumption that a grant once existed and has been lost; but in a *caveat* both parties admit the land to be vacant, and the question is, to whom shall a title be made? *Ibid*, 517

ESTOPPEL.

1. He, who accepts a lease from another, and those claiming under him, are estopped during the continuance of the lease, to deny the title of the lessor. *Sacaroosa* v *King*, 336
2. One, who hires a negro from another, by which he has obtained possession of the negro, shall not dispute the right of the hirer, until he has restored the possession. *Dunwoodie* v *Carrington*, 355
3. Executors are not estopped to claim in their own right lands in a deed which they have endorsed and attempted to confirm, under an express reference to the powers confided to them by the will of the testator. *Hendricks* v *Mendenhall*, 371

EVIDENCE.

1. Where the name of the subscribing witness to a bond is written by the obligor, the person whose name is signed as a witness not being present at the execution of it, it is the same as if there were no subscribing witness, and in such case proof of the obligor's handwriting is sufficient. *Allen* v *Martin*, 42
2. Parol evidence is not admissible to shew that a devisor used the word "heirs" in his will in a different sense from the legal meaning. *Den on Dem. Stith* v *Barnes*, 96
3. Parol evidence is inadmissible for the purpose of proving an agreement inconsistent with, and repugnant to, a bond of submission to arbitration executed by the parties. *Hawkins* v *Hawkins*, 107
4. The rule of law which disallows the introduction of parol evidence, for the purpose of contradicting, altering, or varying a deed, applies only to the *parties* to the instrument. *Ibid*, 107
5. The declarations of a person, now deceased, respecting a corner made when he was the owner of the

land, are not evidence in favor of one claiming under such owner. *Smith* v *Walker*, 127

6. Parol evidence is not admissible to shew that the condition upon which the price of a horse was to be paid, was different from the purport of the note given for the price. *Gatlin* v *Kilpatrick*, 147

7. In an action by a father for the seduction of his daughter, her examination taken before two magistrates for the purpose of charging the putative father with the maintenance of the child under the act of 1741, (1 Rev. Stat. ch. 12, sec. 1) is not admissible evidence against the defendant to prove the fact of seduction. *McFarland* v *Shaw*, 200

8. In an action by a father for the seduction of his daughter, he may give in evidence the dying declarations of the daughter charging the defendant with having been her seducer. *Ibid*, 200

9. Where the defendant gave the plaintiff a writing not under seal, acknowledging the sale of a note of hand and the receipt of part payment, and that the balance was to be paid when the money was collected, *it was held* that the plaintiff could not prove by parol that the defendant, at the time of the contract, promised to commence an action within ten days, against the maker of the note. *Clark* v *McMillan*, 244

10. Where the acts of a person may be given in evidence for him, his declarations in relation to those acts are also proper evidence. Hence *it was held* that where a person was seen hunting the road with his friends and servants, his declarations that he was hunting for lost notes are evidence of the loss of the notes. *Shenck* v *Hutcheson*, 315

11. Parol evidence cannot be received to contradict the records of the County Court, confirming the report of a jury laying out a road. *Cline* v *Lemon*, 323

12. The interest to disqualify a witnees must exist at the time of trial, and, if before that, the witness removes the interest by releasing it, or does all he can to remove it, as by filing a release in the clerk's office when the party is not present to accept it, his competency is restored. *Perry* v *Fleming*, 344

13. Fraud in obtaining a bond will vitiate it, and evidence tending to show it, is admissible under the general issue. *Ibid*, 344

14. When it is clearly proved, by evidence other than the party's own oath which is inadmissible for that

purpose, that a writing is lost by time or accident, parol evidence of its contents is admissible, but not otherwise. *McFarland* v *Patterson*, 421

15. A trustee defendant, having a legal interest altogether nominal, is an incompetent witness at law, but not in equity, as to merits or designs of the trust deed. *Hawkins* v *Hawkins*, 431

16. The rule of admitting hearsay to prove the boundaries of land must be confined to what deceased persons have said; for if they are alive at the time of trial, though out of the State, their depositions must be taken. *Gervin* v *Meredith*, 439

17. Where a deed conveys a specific number of acres, and no corner is named in the deed, parol evidence is not admissible to establish a line in contradiction to the deed, which shall contain less land than the specified quantity. *Harring* v *Wiggs*, 474

18. Where a deed purports to be governed by an old line, which is placed upon the records, parol evidence as to the intention of the parties, tending to control the deed, ought not to be received. *Ibid*, 474

19. A subscribing witness to a note, to whom it is afterwards endorsed, and who then endorses it *without recourse* and is also released by the endorsee, is a competent witness to prove its execution. *Billingsly* v *Knight*, 540

EXECUTORS AND ADMINISTRATORS.

1. When a testator gives his executors authority to sell land, all the acting executors alive at the time must join in the sale. *Debow* v *Hodge*, 36

2. An executor may sue in this State upon letters testamentary issued upon a probate in another State. *Stephens* v *Smart*, 83

3. The claim of the next of kin is from and through the administrator: but he cannot claim above him. Hence an action cannot be sustained under the acts of 1715 and 1793, (1 Rev. Stat. ch. 46, sec. 3, and ch. 81, sec. 1 & 2,) by a person entitled to a distributive share of an intestate's estate, against the clerk of the county court, for neglecting to take an administration bond. *Daughtry* v *Hayne*, 92

4. An action for deceit in the sale of a chattel, will lie against the executors or administrators of the seller,

under the act of 1799, (1 Rev. Stat. ch. 2, sec. 10.) *Arnold* v *Lanier*, 143
5. Where co-executors live in different counties, a warrant from a justice against one of them living within his jurisdiction, shall not be abated because it was served on him only, and not on those living in other counties. *Park* v *Morrison*, 155
6. One administrator, where there are two, cannot discharge a debt due to the estate, by receiving a proved account against the intestate, although the receipt purports to be in satisfaction of the debt. But a payment to one of the administrators would have been good. *Mangum* v *Simms*, 160
7. Where a sale was made by an administrator under the act of 1794, (see 1 Rev. Stat. ch. 46, sec. 11,) on a credit, before the commencement of the action, but the proceeds not received until after plea pleaded, proof of these assets shall not be given against the administrator. For the issue is whether the administrator had assets at the time of plea pleaded; and the plaintiff may prove assets received by the defendant, between the time of issuing the writ and entering the plea, but not afterwards. *Gregory* v *Hooker*, 215
8. In a *sci. fa.* upon a judgment *quando*, the plaintiff may recover such assets coming to defendant's hands after plea pleaded in the original action, as are not already bound by outstanding judgments. *Ibid*, 215
9. An executor or administrator may pay debts of an inferior nature, before he has notice of those of a superior nature, if he does so without fraud. *Delamothe* v *Lanier*, 296
10. A contingent debt, though secured by specialty, shall be postponed to a simple contract debt. *Ibid*, 296
11. An executor or administrator cannot purchase at his own sale; and must account for any negroes bid off by him at his sale of his intestate's property, to the creditors, if any; if none, to the legatees or next of kin. *Britton* v *Browne*, 332
12. When an administrator confesses judgment on a penal bond, the condition of which is that the intestate shall execute a marriage settlement within six months after his marriage, the assets are protected by the amount of the judgment, although such bond was not registered. *Richardson* v *Fleming*, 341
13. Persons named executors in a will, which has been proved, who fairly contest the probate of another pa-

per, produced as a will after a considerable interval, and under circumstances fitted to awaken suspicion, though afterwards established, will be permitted in equity to charge the expense of litigation upon the estate. *Mariner* v *Bateman*, 350

14. The executor's assent to the first taker is an assent to all subsequent takers of a legacy, limited over by way of remainder in executory devise. But this rule does not prevail, where after the death of the first taker, the executor has a trust to perform arising out of the property, which therefore must be subjected to his control and of course he must have the legal title. *Dunwoodie* v *Carrington*, 355

15. Judgments obtained against an executor, after service of a writ and before plea, make him responsible for the assets he had when served with the writ, although such judgments are entered up *quando;* the executor having sold the property of his testator under the act of Assembly, between the time of the service of the writ and the judgments *quando*. *Littlejohn* v *Underhill*, 377

16. Such judgments may be pleaded, although given by a magistrate for a sum exceeding thirty pounds, provided the warrants do not exceed that sum. The charge of keeping an old and infirm slave is a charge in favor of the community upon the estate of a testator in the hands of his executor under the act of 1798, (1 Rev. Stat. ch. 89, sec. 20,) and is to be paid in preference to the claims of any individual. *Ibid*, 377

17. Judgments confessed by an executor or administrator, is not a good plea for him. *Collins* v *Underhill*, 381

18. Where letters of administration are granted in the court of a county, in which the intestate never resided, they are void; and being a nullity, a petition to set them aside will be dismissed. *Collins* v *Turner*, 541

19. Where the same person is administrator or executor of both the creditor and the debtor, and has assets of the debtor in his hands sufficient to discharge the debt, the debt is extinguished. *Muse* v *Horniblow*, 637

20. If a legatee in a will is also executrix, and elect to take as legatee, her power as executrix over the property bequeathed thenceforward ceases; her assent operates for the benefit of the ulterior remaindermen, and converts their equitable into a legal estate.—*Jones* v *Zollicoffer*, 645

21. A younger equity can in no case prevail over an

older one, but where it has also the law; for the rule is, that where there is equity on both sides, the law shall prevail. *Ibid*, 645

22. An executor, who promises to pay a debt of his testator, and has assets at the time of the promise, is personally bound. *Sleighter* v *Harrington*, 679

23. The court have a discretionary power of allowing executors and administrators five *per cent.* on the receipts and five *per cent.* on the disbursements; and though they may allow less, they cannot allow more. But executors and administrators cannot be allowed commissions on a debt due to them as executors of another person. *Bond* v *Turner*, 690

EXECUTION.

1. An equitable right in land cannot be sold under an execution at law. *Payne* v *Hubbard*, 195

2. An equitable right in land is subject to execution and sale under the act of 1812 (1 Rev. Stat. ch. 45, sec. 4, 5 & 6) and equity will not compel a *bona fide* purchaser to pay the balance of the judgment when the land sells for less, although the execution issues at the suit of the legal owner and the equitable owner is insolvent. *Deaton* v *Gaines*, 424

3. Where a slave in the hands of an administrator *de bonis non* was taken in execution and sold for a debt due from two of the next of kin and legatees, and was delivered by the officer to the purchaser; *it was held* that the administrator might sustain an action against the officer; for that the slave was not liable to execution under the act of 1812 (1 Rev. Stat. ch. 45, sec. 4,) which affected only express trusts and not equitable interests in the nature of trusts. *McIlwin* v *Carraway*, 626

4. An order of the county court for the sale of land, after a constable's levy and return of no chattels, is not judgment, though it may have the quality of one in attaching a lien upon the land. Hence a writ, which cannot be sustained, unless there be a judgment or something equivalent, will not lie upon such an order. *Bowen & Stone* v *Lanier*, 673

5. Errors in law cannot be assigned to process in the nature of an execution, for that, if irregular, must be

set aside in a different way; as by motion, *supersedeas* or the like. *Ibid*, 673

6. A sale of land under a *fi. fa.* which issued and bore *teste* after the death of the person who died seised, without any *sci. fa.* against his heirs or devisees, conveys no title to the purchaser. *Bower* v *McCullough*, 684

EXTORTION.

Where, in an indictment for extortion, the jury found that the defendant took more than his legal fees, but did not take them corruptly, such finding is equivalent to a verdict of acquittal, and the defendant must be discharged. *State* v *Bright*, 437

FACTOR.

1. If one purchase goods from a factor, and pay him for them before he is forbidden by the owner, the payment is valid. *Golden* v *Levy*, 141

2. A sale by a factor creates a contract between the owner and the purchaser, and the latter may pay the owner against the orders of the factor. Hence where the plaintiff, a captain of a vessel, which was stranded, employed the defendants to sell the cargo saved, as auctioneers, which they did, and paid the amount to the owners of the goods, except the freight *pro rata* due the captain, such payment was held good. *Ibid*, 141

FIRING THE WOODS.

The penalty for setting fire to the woods is incurred under the acts of 1777 and 1782 (1 Rev. Stat. ch. 16,) unless two days notice is given to the owners of adjoining lands; and an agreement of one neighbor to take shorter notice will not bar a stranger from recovering the penalty under those acts. *Wright* v *Yarborough*, 687

FERRY.

When an ancient ferry has been established and kept, the

court will not erect a new one so as to injure the old one, unless it be evident that the public sustains an inconvenience for the want of it; the public faith to the first grantee ought not to be violated upon a speculative possibility of general convenience. *Beard* v *Long*, 167

FRAUD AND FRAUDULENT CONVEYANCE.

1. A prior voluntary conveyance of land, shall prevail against that of a subsequent purchaser, unless the latter is fair and honest. Hence where A. in consideration of blood and affection, conveyed his lands to his only son, and afterwards for a valuable consideration sold the same land to B.; but with the intention of defrauding his creditors, *it was held* that the son was entitled to recover from one who purchased of B. with notice of the circumstances. *Squires* v *Riggs*, 253
2. Inadequacy of consideration, embarrassed circumstances in the grantor, his remaining in possession of the lands after the sale, the secrecy of the transaction form a combination of presumptions indicative of fraud. *Darden* v *Skinner*, 259
3. Whatever may be the external formality of a deed, yet if its design be to defraud creditors, it is void; and even without such present design, a deed of gift to a child, unattested by a subscribing witness, is void against creditors and purchasers by the act of 1784, (1 Rev. Stat. ch. 37, sec. 19.) *West* v *Dubberly*, 478
4. Where the plaintiff claimed a slave under a fraudulent deed from the owner, who left the State, and afterwards the defendant purchased up a small account against him, on which he sued out an attachment and levied it on the slave, who was sold under it, and the defendant became the purchaser; *it was held* that his title was good, for that he must be considered both creditor and purchaser. *Spence* v *Yellowly*, 551
5. Where the possession does not accompany and follow the title, the transaction is fraudulent in law.— *Gaither* v *Mumford*, 600
6. If an absolute deed is made of a chattel, and a defeasance is made at the same time but separate from it, it shall not operate as a mortgage to the prejudice of third persons, but will be fraudulent and void as to creditors and purchasers. *Ibid*, 600

FREIGHT.

A *pro rata* freight may be recovered from the shipper, if he abandons the goods to the underwriter after the voyage is broken up by the stranding of the vessel. *Van Norden* v *Littlejohn*, 457

GAMING.

Money won at gaming and paid, cannot be recovered back by the loser. *Hodges* v *Pitman*, 276

GENERAL RULES—Page 221.

The Judges of the Supreme Court, with a view to improve the administration of justice by expediting the trial of causes and precluding a laxity of practice tending to impair the security and rights of the citizens, have availed themselves of the power confided by the act of Assembly, and established the following

RULES OF PRACTICE:

I. It is ordered by the court that all causes now set for hearing on the equity dockets, shall be prepared for trial by the ensuing fall term; after which period, no further time to complete testimony shall be allowed to either party, without special order. And no cause in equity shall hereafter be set for hearing until the testimony shall be completed.

II. That in all suits at law brought on for trial at the ensuing fall term, or thereafter, declarations shall be filed before the trial; and no suit shall be tried before that period, unless this rule be complied with.

III. That in all cases, civil and criminal, where no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

IV. Where several counsel are employed on the same side, the examination or cross examination of each witness shall be conducted by one counsel; but the counsel may change with each successive witness.

V. When a party in any civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony, and what he expects to prove by it.

VI. No person who is bail in any suit, either civil or criminal, or who is security for the prosecution of any suit, shall appear as counsel or attorney in the same cause. And it shall be the duty of the Clerks of the several Superior Courts, to state on the docket for the Court, the names of the bail and security for the prosecution in each case.

VII. No entry shall be made on the records of the Superior Courts (the appearance docket excepted) by any other person than the Clerk, or his regular deputy.

VIII. In all cases of general replication, no special matter shall be heard.

IX. From and after the next term of the Supreme Court, no applicant for license to practice law in the courts of this State shall be examined, except during the terms of the Supreme Courts. Licence to practice in the County Courts only shall be granted in the first instance. Nor shall any person be admitted to practice in the Superior Courts, until one year after having obtained licence to practice in the County Courts.

NOTE.

By a rule made by the Supreme Court at December Term, 1838, 4 Dev. & Bat. 185, all applicants for admission to the bar must present themselves for examination during the first seven days of the term.

GIFTS.

Delivery is necessary to complete the gift of a chattel, unless it be granted by deed or is incapable of delivery; therefore, where a father, the day after the death of his son, relinquished to his son's widow all the right which he had to a distributive share of his son's estate, but without deed or delivery, and in the absence of the widow, *it was held* that the father might still recover such distributive share. ***Bullock*** v ***Tinnen***, 251

GRANT.

A grant of land covered by an arm of the sea only at high water, will entitle the grantee to an action of

trespass *quare clausum fregit*, for taking oysters from the rocks within the grant. *McKenzie* v *Hulet*, 613

GUARANTY.

Where the defendant undertook in a letter to the plaintiff, that he would guarantee "any contract which A. should make with him for a vessel and cargo, or any part thereof," and A. made a contract for the same but did not comply with it, *it was held* that the guaranty made by an endorser was a *conditional one*, but that here the undertaking was that A. should comply and not that he should be able to comply; and that the defendant became pledged to the same extent that A. was bound, as soon as the plaintiff parted with his property. *Williams* v *Collins*, 382

GUARDIAN AND WARD.

Where a person enters upon the estate of an infant, and continues the possession, equity will consider such person as a guardian to the infant, and will decree an account against him, and will even carry on such account after the infancy is determined. *Parmentier* v *Phillips*, 294

HARBORING.

2. Under the act of 1791, which gives a penalty for harboring and maintaining runaway slaves, harboring means a fraudulent concealment, and the maintaining must also be secret and fraudulent. *Dark* v *Marsh*, 228

2. Where slaves ranaway from the plaintiff and were found in the possession of the defendant, who openly maintained them and gave notice to the plaintiff that he should retain them until recovered by law, it was held that no action could be sustained under the act of 1791. *Ibid*, 228

HORSE RACING.

1. Where A. and B entered into a covenant with C. and D. to run a horse race on a certain day "for five

hundred dollars" to be staked in bonds with approved security. A. alone executed a bond with security, but gave C. and D. no notice of it. Upon the horse of A. B. winning the race, an action was brought on the covenant against C. and D. when *it was held* that they could not recover, because, first, the bond was signed by A. only, and, secondly, the defendants had no notice of it. *Hunter* v *Jackson*, 21

2. Where the articles of a horse race specify the sum bet, but say nothing as to the time of payment, the money is payable on the day of the race and must then be staked *Tinnen* v *Allison*, 205

HOTCHPOT.

Where a testator died leaving one tract of land undisposed of, and leaving a daughter to whom he had given no land, but a full share of his personal estate, the other sons and daughters, or their children, if any of them have died leaving children, if they claim a share of the land, so undisposed of, must bring into hotchpot all the land settled upon them by the testator, either by deed or *devise*. *Norwood* v *Branch*, 400

HUSBAND & WIFE.

1. Where the wife on the day of her marriage but before its solemnization, conveys slaves to her mother, the husband cannot, after the marriage, recover them back in right of his wife, although the conveyance was made without his knowledge or consent. *Johnston* v *Noble*, 193

2. Marriage operates as an absolute gift to the husband of all the personal estate of which the wife is in possession, whether he survive her or not; but to such as rests in action, the husband is only entitled, on condition that he reduces it into possession during coverture. Hence a warranty of title, annexed to a slave sold to the wife while sole, the slave being recovered from the husband after the death of the wife, does not survive to the husband, because, though relating to property, which did vest in the husband, its essential quality as a *chose in action*, remains unaltered. *Casey* v *Fonville*, 287

INDICTMENT.

1. It is not essential to the validity of an indictment that it should be signed by the prosecuting officer. *State* v *Vincent*, 105
2. It is not necessary under the act of 1791, (1 Rev. ch. 338, sec. 3) in an indictment for perjury to state that that the person holding the court where the false oath was taken, is a Judge of the Superior Courts of law; the latter part of the third section of the said act expressly dispensing with the necessity for such statement. *State* v *Bryson*, 115
3. An indictment cannot be sustained, which charges merely an intention to pass counterfeit bank notes, knowing them to be counterfeit, without charging any culpable act. *State* v *Penny*, 130
3. A person may be indicted for an assault, committed in view of the court, though previously fined for the contempt. The plea of "*autrefois convict*" shall not avail him, because the same act constitutes two offences; one against the court, and the other against the public peace. *State* v *Yancy*, 133
5. In an indictment in the County Court it is not necessary since the act of 1784, (1 Rev. Stat. ch. 35, sec. 12) to describe the defendant by the addition of his occupation. *State* v *Newmans*, 171
6. And even if the indictment were defective from the omission of the addition, a plea in abatement which commences "and the said A. B. (the defendant) comes" &c. is in substance defective, since it admits the defendant to be the person indicted. *Ibid*, 171
7. When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or the intermediate acts. *State* v *Trexler*, 188
8. An indictment, which charges a person with stealing a thing destitute of both intrinsic and artificial value, cannot be supported; therefore an indictment was quashed which charged a person with larceny in stealing "one half ten shilling bill of the currency of the State." *State* v *Bryant*, 249
9. An indictment will lie against the commissioners of the town of Fayetteville for culpable omission and negligence in not repairing the streets; because they

are invested with the power to levy the taxes, one object of which is to keep the streets in order. *State* v *Commissioners of Fayetteville*, 419

10. Where an indictment states that the defendant, on a certain day in a certain year, with force and arms, *at and in the county of Craven*, a male slave called J. B. of the value of fifty shillings, and the property of W. M. of the county of Craven, in the State of N. C., feloniously &c., and the jury find the defendant guilty on such count, judgment will not be arrested for omitting the words "then and there being found," or what is technically called the *ad tunc and ibidem*. *State* v *Sparrow*, 530

11. A caption to an indictment is only necessary, where the court acts under a special commission; and a mistake in the caption of an indictment found in a court which sits by the authority of a public law will not vitiate the indictment. *State* v *Wasden*, 596

12. A man may be indicted separately under the act of 1805, (1 Rev. Stat. ch. 32, sec. 46) for fornication and adultery. *State* v *Cox*, 597

13. If an indictment for forgery contains such a charge as amounts to that crime at common law, the judgment shall not be arrested, although the prisoner be indicted under the statute. *State* v *Walker*, 661

14. If a man is indicted for perjury in swearing that he did not *execute* a certain deed, and the jury find specially that he is guilty of perjury in *denying his signature*, the judgment must be arrested; for a deed may be executed without actual signing; and when from the finding of the jury the defendant may be innocent, he will not be presumed guilty. *State* v *Avera*, 669

15. A person, who contracts with the county to keep a bridge in repair, is indictable for neglect of that duty. *State* v *Crowell*, 683

INDIAN TITLE.

1. The grant made by the Governor in 1717 to the Tuscarora tribe of Indians, is absolute and unconditional, and does not require the residence of the Indians upon the land. *Sacaroosa* v *King*, 336

2. The *proviso* in the act of 1748, ch. 3, sec. 3, being in derogation of rights actually vested in the plain-

tiffs, cannot be regarded. But if the act of 1748 could rightfully superadd the condition contained in the *proviso*, subsequent legislatures had an equal right to modify or abrogate it. And the acts of 1778, ch. 16, and of 1802, make a different appropriation of the land, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748. *Ibid*, 336

INJUNCTION.

1. Where a defendant at law might have had adequate relief, a court of equity will not sustain a bill filed by him for an injunction, on the ground that he did not attempt to prove a meterial fact, in consequence of the advice of his counsel that it was unnecessary. *Fentress* v *Robins*, 610

2. By the act of 1810, (1 Rev. Stat. ch. 32, sec. 13,) bonds given upon obtaining injunctions are put upon the same footing, as to the mode of enforcing them, as appeal bonds, and the proper mode of proceeding upon them is by *sci. fa.* *Bozman* v *Armistead*, 616

3. When, in an answer to an injunction bill, the facts, on which the complainant grounds his equity, are positively denied, or when the truth of them is greatly impaired by reason of the facts and circumstances stated in the answer, and the defendant swears that he has no knowledge of the truth of complainant's allegations, and that he disbelieves them; from the facts and circumstances so set forth and sworn to, complainant's equity is rendered doubtful, the court will dissolve the injunction. *McFarland* v *McDowell*, 15

4. If an injunction be sustained on bill and answer, and the complainant regularly takes depositions, they may be read on another motion to dissolve, made by defendant in consequence of the introduction of an amended answer, which he is permitted to file: but *ex parte* affidavits are not admissible. *Leroy* v *Dickinson*, 110

INTEREST.

A guardian is chargeable for interest on the accumulat-

ed balance of principal and interest annually, after deducting the necessary expenditures for his ward; unless he shews, to the satisfaction of the court, such equitable circumstances, as ought, in conscience, to acquit him of his accountability for such interest. *Branch* v *Arrington*, 230

INFANCY.

An infant under the age of twenty-one years cannot dispose of his personal estate by will. *Williams* v *Baker*, 401

JUDGMENT.

1. A judgment obtained in one State is not *conclusive* between the parties when sued upon in another. *Peck* v *Williamson*, 9
2. A judgment confessed in vacation and then entered up by consent, as of the preceding term, is void and cannot be validated by any subsequent act of the defendant. *Slocumb* v *Anderson*, 77

JURISDICTION.

Where an action is brought for the hire of a slave, and the jury assess damages to less than thirty pounds, the plaintiff must be nonsuited, under the acts of assembly relating to jurisdiction. The act giving concurrent jurisdiction to the Superior and County courts does not repeal that part of the act of 1777 which relates to nonsuits. *Williams* v *Holcombe*, 33

JUSTICE OF THE PEACE.

When a person signs a paper which may relate to his personal, or to his political character, if it is intended to relate to the latter, it ought, for the sake of certainty, to be so expressed. But if the paper signed be peculiar to his political character, there is no need of any addition to his signature. Therefore a warrant signed by a justice of the peace, though he does

not mention his official character, cannot, on that account, be avoided. *Siler* v *Ward*, 161

LARCENY.

Larceny cannot be committed, unless the the thing be taken against the will of the owner. Hence if the thing be sent by the owner for the purpose of entrapping the taker, it will not be larceny. *Dodd* v *Hamilton*, 471

LEGACY.

1. Where a testator bequeathed to his daughter S. a negro girl Nanny, and to his wife a negro woman Fanny, the mother of Nanny; and to his daughter N. the first child Fanny should have; and then directed "that if Fanny should have three children more, they should belong to his daughters S. and N. two a-piece, including Nanny; and all the rest (should she have more than three children, and my said daughters get two a-piece) to be equally divided between my sons B. and D." And in another clause bequeathed "that should Fanny have three children so that my two daughters get two a piece, then at my wife's death Fanny and the rest of her children to be the property of B. and D." *It was held* that it was the necessary effect of every legacy to vest immediately, if not controlled or otherwise limited; that as soon, therefore, as three children were born of Fanny, they became vested in the daughters, who had then "two a piece" including Nanny; that Fanny and the rest of her increase then became vested in B. and D.; which the subsequent death of one the issue of Fanny then living, could not alter or affect. *Settle* v *Wordlaw*, 40

2. A testator bequeathed to himself a child's part, to his his son A. several negroes; and all the rest of his estate to his heirs except his son A. "because he has received his part of my estate of every denomination." If the testator afterwards die intestate as to the part reserved, A. may come in for a distributive share of that part; for the words of exclusion relate only to

the property contained in the residuary clause. *Fort* v *Fort*, 105

LIBEL.

If the libellous matter in a production be not direct, but only libellous by allusion or reference, the fact understood must be stated by introduction, and must be pointed at by explanatory innendoes. *State* v *Neese*, 691

LIMITATIONS, STATUTE OF

1. The act of 1715 (1 Rev. Stat. ch. 65, sec. 11,) will bar an action brought by a county trustee against the executors of a county ranger for money received by their testator in that character, where more than seven years had elapsed from his death to the bringing of the action. *Alexander* v *Alexander*, 28
2. An action of *debt* on a promissory note is not barred by the statute of limitations. *Johnston* v *Green*, 129
3. Where a mortgagor is permitted to remain in possession of the land, and, after the mortgage is forfeited, sells to another who has no notice, and who, together with his aliences, continues in possession seven years claiming the land, that gives a title under the act of 1715, (1 Rev. Stat. ch. 65, sec. 1.) *Baker* v *Evans*, 417
4. A will constitutes a color of title, and if accompanied with seven years possession, will ripen into a perfect one. *University* v *Blount*, 455
5. The death of a tenant before seven years, will not impede the progress of the act of limitations, provided the possession is continued a sufficient length of time after his death, by his heirs or others claiming under him. *Ibid*, 455
6. When the statute of limitations once begins to run, no subsequent disability will stop it. Therefore, where an ancestor brought an ejectment, within a year after his title accrued, and continued to prosecute it until it abated by his death, at which period his heirs at law were infants, and they brought another ejectment within three years after their arriving at full age, it was held that they were barred. *Pearce* v *House*, 722
7. Where account books are put into the hands of a constable for collection, the books themselves are not

evidence that the accounts are due, so as to charge the constable. *Johnston* v *Donaldson*, 727

MALICIOUS MISCHIEF.

Malicious mischief is confined to those cases, where the act is done in a spirit of wanton malignity, without provocation or excuse, and under circumstances, which bespeak a mind prompt and disposed to the commission of mischief; and does not include cases where the act is prompted by the sudden resentment of an injury, which is calculated in no slight degree to awaken passion. Hence an indictment for this offence will not lie where the defendant took a mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound with the view of preventing a repetition of the injury. *State* v *Landreth*, 331

MALICIOUS PROSECUTION.

In an action for a malicious prosecution, whether there was probable cause, is a question of law, but the facts which go to shew it, must be ascertained by the jury. *Legget* v *Blount*, 560

MASTERS AND OWNERS OF VESSELS.

1 The master of a vessel is liable upon a bill of lading signed by him, containing no other exception than that of the dangers of the sea, though the goods are damaged by the unskilfulness of the pilot. *Harvy* v *Pike*, 519

2. The shipper may sue either the master or owner upon a bill of lading signed by the master. *Ibid*, 519

3. Whether an action will lie for a *tort* against the master of a vessel for an injury done by the vessel, or to the goods while a pilot is on board, Qu? *Ibid*, 519

MILLS.

1. Upon an appeal from the County Court in the case of a petition under the act of 1809 for overflowing

lands by the erection of a mill, the jury in the Superior Court must meet on the premises. *Andrews* v *Johnson*, 26

2. Whenever a person has sustained an injury in his property by the erection of a mill by another, it is necessary, if he wishes to obtain redress, first to file a petition in the county court according to the act of 1809. (1 Rev. Stat. ch. 74, sec. 9, et reg. *Mumford* v *Terry*, 308

MURDER.

1. If upon an arraignment for murder the prisoner pleads in chief and is convicted, the judgment shall not be arrested because the venire returned to the Superior Court consisted of forty jurors instead of thirty, nor because one of the grand jurors was on the coroner's inquest. *State* v *McEntire*, 267

2. Nor will it be arrested because it does not appear, on the face of the proceedings, that the bill was found upon evidence under oath, or that any witness was sworn and sent to the grand jury. *Ibid*, 267

NEW TRIAL.

1. If it be proved that the party prevailing in the issue has tampered with the jury, a new trial will be granted. *Wright* v *Wright*, 31

2. Surprise in questions of law, if they be really such as to afford room for doubt, form a ground for a new trial; but not mistake of counsel in a plain point.—*Lester* v *Zachary*, 50

3. If a defendant, on a trial for an assault and battery produce a witness to prove that notice was given to the plaintiff to produce a warrant, on which defendant rested his justification, but the witness being unable to recollect what it was the plaintiff was required to produce, the plaintiff obtained a verdict; a new trial shall not be granted unless the defendant states in his affidavit that he could have made out his justification, if he had been allowed to prove the contents of the warrant. *Gardner* v *Harrell*, 51

4. When the transcript sent to the Supreme Court contains so imperfect a statement of facts, that the court

cannot decide satisfactorily to themselves, a new trial will be ordered. *Hatton* v *Dew*, 137

5. In a caveated entry, where the evidence had been fairly and fully submitted to the jury, and the case was entirely one of matter of fact, the court would not disturb the verdict. *McInnis* v *McInnis*, 154

6. Where the plaintiff neglected to produce on the trial an essential part of the evidence necessary to support his demand, and he alleged that he was taken by surprise, as the objection for the want of this evidence had not been made on several former trials, a new trial was refused. *Porter* v *Wood*, 226

7. In an action for slander, the court may grant a new trial after a verdict for defendant, if in the opinion of the Judge the evidence authorised a verdict for the plaintiff with exemplary damages. *Horton* v *Reavis*, 256

8. Where the law is clearly for the plaintiff, the court will grant a new trial, though several juries have found for the defendant. *Jones* v *Ridley*, 280

9. Where a cause is called in due course, and the plaintiff nonsuited for failing to appear, the court will grant a new trial upon a sufficient affidavit, but it is proper that it should be upon the payment of full costs. *Williams* v *Harper*, 284

10. In an action for a *tort*, the court will not grant a new trial for excessive damages, unless they are grossly extravagant, or unless there is just ground to believe that the jury have acted corruptly. *Dodd* v *Hamilton*, 471

11. When the charge of the Judge is partly right and partly wrong, upon the law arising from the evidence, and it is impossible to say upon what part of the evidence the verdict is founded, a new trial will be granted. *State* v *Jernagan*, 483

NUISANCE.

For any of those acts, which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens: Hence, *it was held*, that an individual owning lands on a river where he was accustomed to take fish, could not maintain an action against one who built a

mill dam across the river below him, whereby the passage of the fish up the river was obstructed.—*Powell* v *Stone*, 241

OFFICE, SALE OF

Any bond, contract or agreement, for the sale of the deputation of the office of Clerk of a Court, by which the party undertakes to pay a sum certain and not out of the profits, is void under the Stat. 5 & 6 Edw. 6, ch. 16 (1 Rev. Stat. ch. 80, sec. 2.) *Haralson* v *Dickens*, 163

PATROL.

Where the County Court does not form rules and regulations for patrollers, under the act of 1802, ch. 15, they must conform to those of 1794, ch. 4; and under that act *one* patroller has not a right to inflict a punishment by himself, and if private persons aid and abet him, though called upon by him to do so, they, as well as he, are all trespassers. *Richardson* v *Saltar*, 505

PLEADING AND PRACTICE.

1. In a proceeding by a *sci. fa.* against securities upon an appeal bond, the defendants, by not putting the record in issue, admit the statements in the *sci. fa.* to be correct. *Evirett* v *Ellison*, 25
2. Upon an indictment for a maim, if no issue be joined between the State and the defendant, judgment must be arrested. *State* v *Fort*, 122
3. When a statement is referred to in a bill in equity and prayed to be taken as part of it, a copy of the statement must be served on the defendant; or it will be equivalent to no service of the bill, and advantage cannot be taken of it by plea in abatement under the act of 1782, (1 Rev. Stat. ch. 32, sec. 4,) which applies only to a case of an *illegal* service, as where the bill has not been served ten days before court, and not to a case where there has been no service. *Worthington* v *Colhane*, 166
4. Where a bill in equity is served upon a party, who

neglects to answer and the bill is taken *pro confesso* and the cause set for hearing, after which he dies, his administrator may be allowed to answer upon affidavit made, that the intestate, for a considerable time before his death, was reduced to such a state of mental debility, as unfitted him for business. But it was also ordered that the complainant should have the benefit of the depositions, taken without notice, while the judgment *pro confesso* was in force. *Haywood* v *Coman*, 204

5. A plea of alien enemy, entered at a term subsequent to that at which the original pleas were entered, is not a plea in bar of the action generally, but only in bar of the further maintenance of the suit, and, being a plea since the last continuance, shall not since the act of 1796, (1 Rev. Stat. ch. 31, sec. 62,) amount to a relinquishment of former pleas. *Teare* v *White*, 210

6. To an action on the case against the defendants for negligently keeping their ferry, in which damages were laid at more than £100, they pleaded in abatement that the plaintiff lived in one county and they in another, and that the "matter in contest was not of the value of £50;" the plea is bad, for the words of the act of 1793, (1 Rev. Stat. ch. 31, sec. 42,) are "debt or demand," and not "the matter in contest;" and further, the action is *ex delicto*, and therefore no one can say, before verdict, what the damages will be. *McGehee* v *Draughon*, 240

7. When a replication is filed to an answer, the complainant may have the opinion of the jury upon the facts in issue, and if the complainant does not proceed in the proper time, the regular course is to set the cause for hearing absolutely, or with such provisions as the court may direct, but not to dismiss the bill.—*Marshall* v *Marshall*, 318

8. Where a judgment in ejectment was entered against a defendant, because he had not given bond for the costs, as required by act of Assembly, and a writ of possession had issued and the plaintiff put into possession, the court, on the application of the defendant at the next term and his affidavit "that he would have given the security for costs, had he known it was necessary, and that he believes he has a good title to the lands in dispute," should upon a rule's being served on the plaintiff, order the judgment to be set aside, a writ of restitution to issue, and the defendant be per-

mitted to plead, on giving bond and security as required by act of Assembly. *Beaner* v *Pilley*, 329
9. Where on a note payable to three persons the suit was brought in the name of the survivor, the court permitted the attorney in fact of the plaintiff of record to dismiss the suit, though it was alleged and offered to be proved that the beneficial interest was really in another person. *Jones* v *Blackledge*, 342
10. The plea of the statute of limitations may be pleaded, after issue joined, upon payment of full costs, under peculiar circumstances. *Hamilton* v *Shepard*, 357
11. A plaintiff cannot abandon a count upon special agreement, and recover upon the common count, upon the ground that the evidence of the special agreement has been lost. *McFarland* v *Patterson*, 421
12. A court of law cannot look into the *equitable* claim of persons who are, or are not parties, but must dispose of each case as the rules of *law* direct. Hence a release from an equitable assignee of a bond shall not be admitted to defeat a suit in the name of the legal owner of such bond. *Arrington* v *Horne*, 435
13. After the testimony in a cause is closed, the introduction of other witnesses, is a matter within the sound discretion of the court, and will be allowed or forbidden according to the nature of the action, the conduct of the parties, and the necessity of receiving further evidence for the advancement of justice.—*Kelly* v *Goodbread*, 468
14. Where an administrator is fixed with assets by the finding of a jury, and execution issues on which *nulla bona* is returned, the next proper process is a *sci. fa.* suggesting a *devastavit*, and not a special *fi. fa.* or an action of debt for a *devastavit* may be brought instead of the *sci. fa.* *Hunter* v *Hunter*, 558

POSSESSION.

1. The plaintiff in an action of trespass *quare clausum fregit*, must shew that when the trespass was committed, he had either actual or constructive possession of the land. Therefore where the plaintiff had purchased the land at an execution sale in November 1804, but did not obtain a deed from the sheriff till July, 1805, and in the intermediate time, to-wit, the 10th February, 1805, the defendant committed the

trespass, claiming under the defendant in the execution, *it was held* that the action could not be maintained. *McMillan* v *Hafley*, 186

2. Constructive possession exists only when the party claiming his title to the land, and there is no one in actual possession, claiming under an adverse title. *Ibid*, 186

3. The possession under color of title, which is necessary to give title to the plaintiff and enable him to recover in ejectment, must be continued and uninterrupted for seven years. *Jones* v *Ridley*, 280

4. The possession of a part of a tract of land, is possession of the whole claimed by a deed, where there is no adverse possession or superior title. *Fitzrandolph* v *Norman*, 564

POWER.

1. In the execution of a power, it is not necessary to recite that the act is done by virtue of the power, but it is sufficient if it can be done *only* in virtue of it; for the purpose of the act can only be explained by resorting to the power. *Hendricks* v *Mendenhall*, 371

2. Where a power is created by a deed, authorising a husband to appoint to whom land shall be conveyed, and, in case of his death before his wife, authorising her to do it, there must be not merely an intention in the husband to appoint, but an actual appointment, in the precise form required by the power, before the wife's right of appointment is defeated. Therefore where a power requires, among other requisites, that the trustee should convey to such person as the husband should limit or appoint, and the husband executes afterwards an instrument of writing, authorising the trustee to convey to whom he pleases in his discretion, this is not an execution of the power, nor a destruction of that subsequently limited to the wife. *Haslin* v *Kean*, 700

PRESUMPTION.

1. A presumption in law arises from the payment of the last instalment upon a bond, that the preceding ones have been paid, provided it has been made in the manner and at the time contemplated by the parties;

If otherwise, it is a presumption that the parties are acting under a new agreement. *Ward* v *Green*, 206

2. The lapse of fifteen years, unaccompanied by other weighty circumstances, is not sufficient to raise the presumption of the payment of a judgment. *Lenox* v *Greene*, 261

3. Presumptive evidence ought not to be erected on surmise, and especially against a record, but on a solid foundation, and is only created when the circumstances are such as to render the opposite supposition improbable; it ought also to be stronger to defeat a right than to support it; and the facts, from which a presumption is deduced, ought to be consistent with the proposition they are intended to establish. *Ibid*, 261

4. The presumption of a grant can never arise, unless the party claiming has been in the actual possession of the land. *Cutler* v *Blackman*, 368

5. A grant may be presumed from great length of possession, although no privity can be traced between the successive tenants. And, in such a case, a color of title for the land, as to part of the time, may be offered to the jury as a circumstance. *Fitzrandolph* v *Norman*, 564

6. The act of 1791 (1 Rev. Stat. ch. 65, sec. 2) making certain possessions valid against the State, does not affect the common law principle of presuming a grant. *Ibid*, 564

PRACTICE.

1. Where the plaintiff obtains a verdict, but the statement of the case shews he had no title, a new trial must be granted. But if the merits appear to be with the plaintiff, the court will give him leave to add other counts. *Pollok* v *Kittrell*, 585

2. Where the plaintiff sued out sixteen warrants against the defendant upon *due bills*, the highest of the warrants including only four dollars, the court, on motion, refused to consolidate the warrants, principally on account of the policy of the act against due bills. *Smith* v *Bowell*, 633

3. Where the jury decide against the weight of evidence in a case where no flagrant breach of duty is committed by the person in whose favor they find; where also there may reasonably exist a difference of

opinion ; and where it is certain that justice has been done, the court will not grant a new trial, upon the bare probability that the contract is usurious. *King* v *Hill*, 644

4. It is the province of a jury in an equity suit to try only such disputed *facts*, as the parties by the bill and answer, submit to them ; but to find that a sale is justifiable, is a *conclusion of law*, not submitted to them. *Jones* v *Zollicoffer*, 645

5. It is the province of a Judge, in a case of homicide, to explain the law to the jury, leaving to them the exclusive decision as to the truth or falsehood of the facts given in evidence ; Hence it is not improper for him to charge the jury that "the prisoner was guilty of murder, or guilty of no offence at all—that it was not a manslaughter case ;" if the facts deposed to by the witnesses, if believed, established a case of murder. *State* v *Walker*, 662

6. The true construction of the act of 1810, c. 12, allowing *sci. fa.* on injunction bonds, seems to be that the obligee might sue by *sci. fa.* on all such bonds, whether executed after or before the passage of the law. *Bozman* v *Armstead & Fessenden*, 688

7. If the plaintiff summon not more witnesses than the number allowed by law, and they are absent when the trial comes on, but the plaintiff nevertheless recovers, upon the plaintiff's affidavit that they were material and were expected by him at the trial, the defendant shall pay the costs of their former attendance. *Carpenter* v *Taylor*, 689

PURCHASER.

1. A Court of Equity will not compel a purchaser for a valuable consideration, without notice to part with any legal advantage he has over his adversary, although he may have obtained it accidentally or improperly ; nor will it compel him to discover his title, or title deeds or boundaries, nor to surrender title deeds, nor suffer testimony to be perpetuated against him ; because a Court of Law would do none of these things. But where nothing is asked of him but what a Court of Law would compel him to perform, Equity affords him no protection, and does not allow

him to withhold the property of another. *Jones* v *Zollicoffer*, 645

2. When a bill is filed by one, who has the legal title, but under such circumstances that he cannot be completely redressed at law, it is no defence for the purchaser to plead that he purchased for a valuable consideration without notice. Such plea will only protect the honest purchaser after he has got the legal title. *Ibid*, 645

REFUNDING BOND.

A refunding bond given by a distributee is not void because but one surety is given. The one is not less bound than if two or more had been given. *Cheatham* v *Boykin & Horrell*, 670

REGISTRATION.

1. No deed, in itself invalid and inoperative, as for the want of a consideration either good or valuable, is rendered valid by registration; registration being only required for the purpose of perpetuating titles to land. *Stanly* v *Smith*, 124

2. The act of 1785, (1 Rev. Stat. ch. 37, sec. 29,) which requires the registration of marriage contracts, makes them void against creditors only, if it be omitted. *Richardson* v *Fleming*, 341

REMOVAL.

1. An affidavit for the removal of a cause is sufficient under the act, 1 Rev. Stat. ch. 31, sec. 120, if it state that the adverse party has considerable influence, which he will probably exert, and that many persons hold freeholds under him who may be turned off at his pleasure. *Smith* v *Hartter*, 131

2. Where a suit had been depending several terms, and one of the defendants married, her husband who was made a party, was permitted on sufficient affidavit, to remove the cause to another county for trial. *Knowis* v *Baker*, 196

REPLEVIN.

The action of replevin cannot be supported unless a *taking* is proved. *Cummings* v *McGill*, 535

ROBBERY.

1. The snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery. *State* v *Trexler*, 188
2. Where the prosecutor accidentally in the presence of the prisoner, dropped some papers out of his pocket book, among others a bank note of $100, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued between the prosecutor and the prisoner for the possession of the note, which resulted in the prisoner's retaining possession and running off with the note, *it was held*, that as the bank note was not the subject of larceny, it was a forcible trespass. *Ibid*, 188

ROADS.

1. By the act of 1784, (1 Rev. Stat. ch. 104, sec. 1–4,) the interposition of a jury is necessary in the laying out, altering or changing roads; but in deciding in the first instance, that there shall be a road in a particular section of the country, or in discontinuing such roads as may be deemed useless, the jury has nothing to do; the whole power being given to the court. *Carr* v *Hairston*, 20
2. An appeal would not lie from the decision of the county court, in the case of a petition for a private way before the act of 1813, (1 Rev. Stat. ch. 104, s. 3. *Wood* v *Hood*, 126
3. In an indictment against an overseer of the road, it is necessary to show that he had been served with a notice of his appointment ten days before the offence charged. *State* v *Everit*, 436

SCIRE FACIAS.

A *sci. fa.* issued upon a judgment *nisi* for a forfeiture,

which does not state any sum to have been accrued by the forfeiture is fatally defective. *Holding* v *Holding*, 324

SHERIFF.

1. A sheriff may surrender a person whom he has taken under a *ca. sa.* to the court whence the writ issued at the return term thereof, and have the surrender entered of record, without giving notice of it to the plaintiff in the execution. *Rutherford* v *Allen*, 69

2. A sheriff may confine, in the prison of his own county, a person arrested by him on a *ca. sa.* but he cannot imprison him in the county whence the writ issued. Nor can the sheriff of the county whence the writ issued imprison a person surrendered on the return of the *ca. sa.* unless a *committitur* be entered of record. *Ibid*, 69

3. The verdict of a jury summoned by a sheriff to find whether goods belong to the defendant in an execution, cannot bind the rights of the litigating parties, and can only have the effect to satisfy *himself* on the question of property; to govern his discretion in the exercise of his office; to excuse him for returning "*nulla bona*," and to mitigate the damages in an action of trespass, should the goods taken not belong to the defendant. *Pearson* v *Fisher*, 72

4. *It seems* that the plaintiff in an execution may sustain an action against a sheriff, who refuses to sell property, because a jury has found that it does not belong to the defendant, if in fact it was his; but if the plaintiff offer the sheriff an indemnity, the action certainly may be maintained. *Ibid*, 72

5. The return on a *fi. fa.* of "not satisfied," is not a due return under the act of 1777, (1 Rev. Stat. ch. 109, sec. 18,) and the sheriff making such return is consequently liable to an amercement of one hundred dollars. *Douglas* v *Auld*, 112

6. A return upon a subpœna in the name of a person, who subscribes his name with D. S annexed, (by which is understood deputy sheriff,) is insufficient; for the court cannot judicially know a person deputed to act for the sheriff; because his authority rests upon

the private delegation of the sheriff. The return should be in the name of the principal. *Holding* v *Holding*, 324

7. The return of a sheriff is upon oath, and therefore concludes a party in many cases; but a return of a person styling himself deputy sheriff, has no greater verity than that of any private individual. *Ibid*, 324

8. That the sheriff was kept off by force of arms is a good return upon *mesne* process; for upon such process, he may, but is not obliged to, raise the *posse comitatus*. *Crumpler* v *Glisson*, 516

SLAVES.

1. A parol gift of a slave by a father to his son is void under the act of 1784 (1 Rev. Stat. ch. 37, sec. 19) as against creditors. *Pearson* v *Fisher*, 72

2. A parol gift of slaves by a father to his child is void under the act of 1784 (1 Rev. Stat. ch. 37, sec. 19) as against creditors. *Sherman* v *Russell*, 79

3. The punishment of a slave for horse stealing is whipping and loss of ears for the first offence, and death for the second under the act of 1741, c. 8, sec. 10, the subsequent acts prescribing the punishment of horse stealing not extending to slaves. *State* v *Levin*, 250

4. A person may be convicted for stealing a runaway slave, knowing him to be runaway and to whom he belonged. *State* v *Davis*, 271

5. If an indictment charge the stealing a slave "the property of A. B. deceased," judgment must be arrested, for it should have charged the slave to be the property of A. B's executors or administrators. *Ibid*, 271

6. A mortgage of slaves is valid under the act of 1792 (1 Rev. Stat. ch. 37, sec. 19 & 21) without an attesting witness between the parties. *Cotten* v *Powell*, 313

7. A written transfer of slaves is necessary, under the act of 1806 (1 Rev. Stat. ch. 37, sec. 17) in all cases where a person gives slaves to another. *Ibid*, 313

8. The third section of the act of 1806, (Rev. ch. 701, sec. 3) relating to gifts of slaves theretofore made, refers only to adverse claims. Hence where, after a parol gift made prior to 1806, by a father to his son, the possesion of the slaves was sometimes in the father and then in the son, but the title was acknowledged by the father to be in the son, *it was held* that the

possession of the father was not adverse, and the third section of the act referred to did not apply. *Drew* v *Drew*, 321

9. Where the wife, to whom her father had made a parol gift of slaves prior to the year 1806, was an infant when the act was passed in that year relative to such gifts, and married during her infancy, *it was held*, that the act did not bar a suit brought by her husband and herself more than three years after the passage of the act. *Allen* v *Gentry*, 411

10. Larceny or seduction of a slave under the act of 1779 (1 Rev. Stat. ch. 34, sec. 10) cannot be committed in a slave, where the owner, through his agent, consents to the taking and asportation; though such consent was given for the purpose of apprehending the felons. But where the defendants bring a slave to a particular place, after such assent of the owner, but in pursuance of a plan matured before the assent given, if the jury are satisfied that both defendants were privy to the felony and equally concerned, they may properly convict them. *State* v *Jernagan*, 483

11. Larceny may be committed in taking a runaway slave, knowing him to be runaway and to whom he belonged. *Ibid*, 483

12. Whether a person convicted as an aider or abetter under the act of 1779 is entitled to the benefit of clergy. Qu? *Ibid*, 483

SLANDER.

1. It is not actionable to say of a man, "he, one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana, in a rookery box, and committed to jail, and remained there until next day nine or ten o'clock, and then was turned out and split for the country," when it is not charged in the declaration that the plaintiff was a justice, or that the words were spoken of him in relation to his office. *McGuire* v *Blair*, 328

2. It is not actionable to say of a person that he swore to a lie "in obtaining a warrant from a justice respecting a deer;" where it appeared that the justice had no jurisdiction of the offence, and therefore perjury could not be committed in it. *Boling* v *Luther*, 635

TAXES.

1. The purchaser of land sold for taxes is not bound to show that the sheriff advertised the land agreeably to law. *Stanly* v *Smith*, 124
2. When the sheriff sell an entire tract of land for taxes on the whole, when no tax is due for one-third part, the sale is void. *Jones* v *Gibson*, 480

TENANT AT WILL.

A tenancy at will is not created until the lessee enters. Hence a tenant at will who has never had possession cannot maintain ejectment. *Pollok* v *Kittrell*, 585

TOWN OF FAYETTEVILLE.

An ordinance passed by the commissioners of the town of Fayetteville directing the constable to take up and sell all hogs found running at large in the streets is void, because the act of Assembly gives every person who thinks himself aggrieved by the judgment of the commissioners, the right of appeal, and because such ordinance condemns the property without hearing the owner. *Shaw* v *Kennedy*, 591

TRESPASS.

1. Trespass, and not case, is the proper remedy against a person, who takes out an execution upon a judgment which he knows to be satisfied, and the action may be sustained against an assignor of the judgment who received the satisfaction, though the execution was taken out in his name by the assignee. *Bradley* v *Carrington*, 38
2. An action of trespass is the proper remedy against one who enters the plaintiff's house, under a warrant, to search for a runaway slave. *Gardner* v *Neil*, 104
3. An action of trespass for chatels will lie, either upon an actual or constructive possession. *Carson* v *Noblet*, 136
4. So, if the owner have the right of present possession, and can regain the possession when he pleases, though the actual possession be in another. *Ibid*, 136

5. In an action of trespass for entering the plaintiff's close and taking his oysters and making profit of the shells, the proper rule of damages is the clear profit made by the defendant. *McKenzie* v *Hulet*, 613

TROVER.

Trover cannot be maintained on the possession of a chattel, where it appears that the legal title is in another, and that the plaintiff has only a trust. *Laspeyre* v *McFarland*, 620

TRUST.

1. If a person enters land, knowing it to have been previously appropriated, he becomes a trustee for all equitable claimants under such appropriation. *Benzein* v *Lenoir*, 117

2. The jurisdiction of equity over trusts can only be taken away, by shewing the complete execution of the trust: And where one buys a slave for another with the money of the other, but takes a bill of sale to himself, a mere delivery of the slave to the *cestuy que trust* will not be considered an execution of the trust to oust the jurisdiction of a court of equity over the subject. *Jordan* v *Jordan*, 292

USURY.

Where an usurious agreement is made in this State, but the illegal interest is received in South Carolina, an action will not lie for the penalty. *Graham* v *Lowrie*, 622

UNITED STATES DUTY.

Where a person makes pig iron at his own furnace, which he works into bar iron at his own forge, the article is liable under the act of Congress of 1815 for a distinct duty in each stage of its manufacture. The exemption of articles for the maker's own use signifies for his own consumption. *Frew* v *Graham*, 609

WARRANTY.

1. Upon an eviction, the seller of land warranted, is li-

able only to the original value at the time of sale, that is, the purchase money with interest, and not to the increased value at the time of eviction, whether such increase of value arises from the ordinary and regular rise of property, or from improvements or otherwise. *Philips* v *Smith*, 87

2. Where a person sold a slave "about eleven years of age, sound and healthy, and do by these presents further covenant and agree to warrant the right" &c., *it was held* to amount to a warranty of soundness. *Gilchrist* v *Marrow*, 410

WIDOW.

Where a widow dissents from her husband's will, she is not entitled to a year's provision under the act of 1796. *Collins* v *Collins*, 301

WILL.

1. A petition filed to set aside the probate of a will, must be accompanied with an affidavit. *Moss* v *Vincent*, 298

2. Though a paper writing be called a deed in the body of it, and the party was advised to make a deed, yet if the structure and operation of the writing shew it to be testamentary, made with a view to the disposition of a man's estate upon his death, it will enure as a will. *Henry* v *Ballard*, 397

3. An application to set aside the probate of a will on the ground of irregularity, must be made to the court where the will was finally tried, and not to the court where it was first offered for probate. *Harper* v *Gray*, 416

4. Where, on the trial of an issue of *devisavit vel non*, the will was attested by two witnesses, one of whom was absent from the State and whose credibility was impeached at the trial, so that the will was proved only by the other, whose testimony if credible, the court instructed the jury, was sufficient to establish the will, although the absent witness was proved incredible, the jury found against the will, and the court refused to grant a new trial. *Wright* v *Wright*, 429

5. A petition to set aside the probate of a will must be

accompanied with an affidavit made before a person competent to take it—one made before a magistrate of another county will not be sufficient. *Jeffreys* v *Alston*, 438

6. Where a will of land appears to have been attested by two witnesses, and the certificate of probate states that it was proved by one, it will be intended *prima facie* that it was *legally* proved by him. *University* v *Blount*, 455

WITNESS.

1. In an action of slander the plaintiff is entitled to two witnesses to prove the first speaking of the words, and two for each repetition of them; and and as many to meet the defence set up by the defendant as the court may deem to have been necessary. *Byrd* v *Rouse*, 53

2. Two *sci. fas.* issued to the county where the witness resided when he was summoned, on which "not found" is returned, are sufficient to authorise the entry of a judgment against him. *Thompson* v *Johnston*, 103

3. A person who removes to another State after being recognised or summoned on the part of the State, is entitled to mileage from the place of his actual residence. *State* v *Stewart*, 138

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